Supreme Court, U.S.
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No. ____

In the
Supreme Court of the United States
October Term, 1996

Paul W. Bergstrom, Joseph S. Friedberg
and Gregory J. Semanko,

Petitioners,

v.

The Dalkon Shield Claimants Trust,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court had subject matter jurisdiction to enter its March 1, 1995 Order Disallowing Unreasonable Attorneys Fees on Pro Rata Distribution following confirmation of the debtor's Chapter 11 plan of reorganization.

2. Whether the procedures established in the district court's March 1, 1995 Order Disallowing Unreasonable Attorneys Fees on Pro Rata Distribution, and the analysis performed by the district court utilizing the factual record created pursuant those procedures, violated Petitioners' right to due process of law guaranteed in the Fifth Article of Amendment to the United States Constitution.

3. Whether a district court's *sua sponte* exercise of judicial power to supervise the reasonableness of contingency fee agreements, in the absence of a case or controversy, violates Article III, Section 2 of the United States Constitution.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appellants: Paul W. Bergstrom; A. Russell Blank; Thomas J. Brandi; Marc C. Bush; William D. Cook; Peter Danziger; Glenn A. Dorfman; J. Michael Egan; Paul E. Fagan; Michael Fields; Joseph S. Friedberg; Michael Friedman; William C. Gage; Abraham N. Goldman & Associates, Ltd.; Jeffrey Holl; James B. Hovland; Arthur C. Johnson; Charles Johnson; Rodney A. Klein; Martina Langley; Edward C. Y. Lau; Stan Linker; Henri E. Norris; Ralph Pittle; Michael A, Pretl; Ron Schnieder; Gregory J. Semanko; Sybil Shainwald; and Andrew S. Zieve.

Appellee: Dalkon Shield Claimants Trust

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IN THE

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PAUL W. BERGSTROM, JOSEPH S. FRIEDBERG,
AND GREGORY J. SEMANKO

Petitioners,

v.

THE DALKON SHIELD CLAIMANTS TRUST,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit, entered on June 20, 1996, is reported at 86 F.3d 364 and reproduced in the Appendix to this Petition at page 1a.[1] The Order Disallowing Unreasonable Attorneys Fees on Pro Rata Distribution ("Disallowance Order") filed by the district court on March 1, 1995 is not

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[1]All further references to the materials set-forth in the Appendix to this Petition will be made by ("[*page no.*][*letter*]").

reported, but is reproduced at page 1b. The memorandum opinion of the district court denying Petitioners' Motion to Vacate the Disallowance Order was filed on May 2, 1995 and is reported at 182 B.R. 128. (1c).

JURISDICTION

The opinion and judgment of the Court of Appeals for the Fourth Circuit was entered on June 20, 1996. No rehearing was sought. This petition was filed within ninety (90) days of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional and statutory provisions cited below are set-out verbatim at page 1i:

U.S. CONST. art. III, § 2
U.S. CONST. amend. V
11 U.S.C. § 101(10)(A), (13), (54)
11 U.S.C. § 105(a)
11 U.S.C. § 301
11 U.S.C. § 1101(2)
11 U.S.C. § 1141(b)
11 U.S.C. § 1142(a), (b)
28 U.S.C. § 157(a), (b)
28 U.S.C. § 1334(a), (b), (e)

STATEMENT OF THE CASE

During the early 1980s. the Petitioners began representing women who suffered a variety of unusual

obstetric and gynecologic medical problems after using an intrauterine contraceptive device manufactured by the A.H. Robins Company, Incorporated ("Robins") known as the Dalkon Shield. After investigating the merits of each claim, Petitioners filed lawsuits against Robins and, in some instances, against its products liability insurer, Aetna Casualty and Surety Company ("Aetna"). Successful negotiated settlements were reached in some cases, but many more were prepared for trials venued in several different states.

The trial and settlement of cases was suddenly halted on August 21, 1985 when Robins filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Virginia under Chapter 11 of the Bankruptcy Code. On that same day, the district court withdrew reference of this case to the bankruptcy court pursuant, thereby retaining original jurisdiction in the district court. *See In re A.H. Robins Co., Inc.*, 59 B.R. 99, 105 (E.D.Va. 1986).

In addition to staying all settlement and litigation activity against Robins and Aetna, the Robins bankruptcy created uncertainty in the minds of many lawyers as to whether it would be profitable to continue representing Dalkon Shield plaintiffs once Robins emerged from the reorganization process. As a result, many law firms sought to dissolve their professional relationships with Dalkon Shield clients or refer those cases to other firms who had the stamina and financial resources to endure this uncertain climate.

The Petitioners were contacted by several such law firms and, after conferring with each client, agreed to assume responsibility for several hundred of the orphaned Dalkon Shield files on a contingency fee basis. The contingency fee agreements signed by Petitioners' clients provided that Petitioners would receive a fee equal to a specified

percentage, almost universally one-third, of any amounts recovered by those clients through trial, settlement or otherwise.

The Petitioners continued to investigate and prepare each of their client's cases as though the bankruptcy had not occurred. Petitioners had no choice but to do so. While the bankruptcy filing stayed all settlement and litigation activity, it did not stay the natural erosion of witness memories nor the death of treating physicians. To preserve evidence and protect the legal rights of its Dalkon Shield clients, Petitioners hired Ob/Gyn-trained nurse-consultants and additional paralegal support staff to assist in the collection and review of literally hundreds of thousands of medical record pages and reams of other supporting documentary evidence. This process was also very expensive and the probability that Petitioners would ever recover these costs was far from certain.

On March 28, 1988, Robins filed its Sixth Amended and Restated Plan of Reorganization (the "Plan") (1d). The Plan was a cooperative effort between Robins, Aetna and the Official Committees, and provided a well-organized framework to effect the post-consummation distribution of an estimated $2.475 billion to more than 200,000 personal injury tort claimants. The Plan was confirmed by the district court on July 26, 1988 and consummated on December 15, 1989.

On the date of consummation, Robins executed the Claimants Trust Agreement (the "CTR") which created an entity known as the Dalkon Shield Claimants Trust (the "Claimants Trust") (1e). The Claimants Trust is a non-reversionary settlement trust managed through the collaborative efforts of five independent trustees. The existence and power of the Claimants Trust does not flow from the district court, but from the CTR itself.

Under the Plan, a claimant's right to receive payment

from the Claimants Trust arises solely from the claims resolution process established in the Claims Resolution Facility (the "CRF"). (1g). The CRF provides claimants with a choice among three options within which their personal injury claims will be resolved. Each of these options is summarized in the opinion of the lower court. (12a-13a).

Punitive damages are not recoverable under the CRF. As a surrogate, and to satisfy the non-reversionary aspect of the Trust corpus, the debtor promised that after full payment of all claims, the residue "shall be paid in lieu of punitive damages to all claimants . . . who received compensatory damage awards from the Trust, on a pro rata basis consistent with such awards." *See* CRF Guideline 14. (3g).

Finally, the Plan provided that the district court would retain jurisdiction over ten specific matters after Plan confirmation and passage of the confirmation date. The Plan and Confirmation Order made clear, however, that the district court would *not* retain jurisdiction over: 1) the determination of any disputed Dalkon Shield personal injury claims, 2) the allowance, disallowance, estimation, liquidation or determination of any Dalkon Shield claim; 3) the day-to-day operations of the Trust; and 4) the Claims Resolution Facility. *See* Plan § 8.05. (7d-8d).

From 1990 through March, 1995, the Claimants Trust implemented the CRF and reviewed the documentary evidence submitted by approximately 200,000 claimants world-wide. (14a-15a). More than 173,000 were resolved through settlement, alternative dispute resolution ("ADR"), arbitration or trial. (14a). Approximately 119,000 claimants, the most of which were not represented by an attorney, settled their claims for the sum of $725.00. (12a). A majority of the remaining claimants resolved their claims under Option 3 though settlement, ADR arbitration or trial. The average settlement award extended to Option 3 claimants exceeded $36,000 (14a), most of whom *were* represented by

counsel.

On March 1, 1995, the Honorable Robert R. Merhige, Jr., United States District Judge for the Eastern District of Virginia, *sua sponte*, entered its Disallowance Order disallowing attorneys' fees in excess of 10 percent of the amount of any pro rata distribution to be made to claimants under CRF § G.14. (1b). According to the district court, its Disallowance Order was entered pursuant to its authority to "supervise members of the bar, its inherent powers to regulate attorney-client relations and compliance with ethical standards by attorneys, the equitable powers of the Court under 11 U.S.C. § 105(a) and the inherent equitable powers of the Court . . .." (3b).

On April 17, 1995, the Petitioners, filed a joint Motion in the district court to Vacate the Disallowance Order. Among other grounds, the Petitioners maintained that the court lacked subject matter jurisdiction to enter the order, that the order was entered in the absence of a case or controversy as demanded by Article III, Section 2 of the United States Constitution, and that the order violated the Due Process clause of the Fifth Article of Amendment to the United States Constitution. (9c-10c). Petitioner's also filed individual Motions for Reinstatement with the district court, in accordance with the terms established in the Disallowance Order, which raised factual issues specific to their individual cases.

On April 27, 1995, the district court heard oral argument on the joint Motion to Vacate prior to hearing testimony regarding the Petitioners' individual Motions for Reinstatement. The district court denied the Motion to Vacate from the bench at the conclusion of oral argument. The district court stated that it was convinced that it had jurisdiction to enter the Disallowance Order, but reserved until a later date the writing of its reasons for denying the joint motion. The district court then heard testimony on the

individual Motions for Reinstatement.

The district court entered its Order and Memorandum opinion denying the Motion to Vacate on May 2, 1995. (1c). In addition to the "supervisory authority", "inherent powers" and "equitable powers" asserted in its Disallowance Order, the district court supplemented these grounds in its May 2, 1995 order by asserting jurisdiction pursuant to 28 U.S.C. § 1334(b), 11 U.S.C. § 1142(b) and the retention of jurisdiction clause in Plan § 8.05. (11c-15c).

On May 10, 1995, the Petitioners filed a Motion to Amend the May 2 Order, requesting that the district court certify the matter for immediate appeal and stay further proceedings on the individual Motions for Reinstatement. On May 22, 1995, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the district court entered final judgment as to the March 1 and May 2 Orders and stayed further action on Petitioners' individual Motions for Reinstatement pending an appeal to the Court of Appeals for the Fourth Circuit. (18a).

On June 9, 1995, the Petitioners filed their Notice of Appeal in the Court of Appeals for the Fourth Circuit, alleging appellate jurisdiction under 28 U.S.C. §§ 158(d) and 1291 and Federal Rule of Civil Procedure 54(b). The Petitioners re-asserted the arguments raised in the district court, including that the district court lacked subject matter jurisdiction to enter its order, that the procedures set-forth in that Order violated Petitioner's right to due process of law and, if jurisdiction did exist, the district court failed to properly apply the reasonableness test adopted by all federal courts. (18a).

The Fourth Circuit entered its opinion on June 20, 1996, affirming, in its entirety, the Disallowance Order and the district court's May 2, 1995 memorandum opinion affirming that order. (1a).

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW ERRONEOUSLY TREATED THE CHALLENGED ORDER DISALLOWING UNREASONABLE ATTORNEYS FEES ITSELF AS AN INDEPENDENT BASIS FOR THE DISTRICT COURT'S SUBJECT MATTER JURISDICTION.

The jurisdictional question presented to the court below for *de novo* review was whether the district court possessed subject matter jurisdiction under 28 U.S.C. § 1334(b) at the time it entered its March 1, 1995 Disallowance Order. (18a). Section 1334(b) identifies three types of matters over which the district court has jurisdiction:

1) "proceedings arising under title 11",
2) "proceedings arising in" a case under title 11,
3) proceedings "related to" as case under title 11.

28 U.S.C. § 1334(b). The lower court began its analysis by defining the terms "arising in" and "related to" as construed by the Fifth Circuit in *Matter of Wood*, 825 F.2d 90,97 (5th Cir. 1987) and the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984). The proper next-step in the lower court's jurisdictional analysis would have been to identify what "proceeding", if any, existed on March 1, 1995 which could be characterized as one "arising in" or "related to" Robin's title 11 case. Unless one of those two types of civil proceedings were before the district court at the time it entered its Disallowance Order, the district court would be

without a jurisdictional basis under section 1334(b) for entry of the order.

At that point, the Petitioners submit, the court below made a critical error of analysis. Instead of identifying that pre-existing "arising in" or "related to" proceeding, thereby giving rise to a valid jurisdictional basis for entry of the Disallowance Order, the lower court held that subject matter jurisdiction existed in the district court because the Disallowance Order *itself* was a proceeding "arising in" a case under Title 11:

> The district court's order limiting the percent that the plaintiffs may receive in fees out of the pro rata distribution could not have occurred but for the bankruptcy and, therefore, *said order "arises in" the bankruptcy, and the court has jurisdiction* under § 1334(b).

(20a) (emphasis supplied). The court below made an identical error with respect to its "related to" analysis by treating the Disallowance Order *itself* as the proceeding "related to" a case under Title 11:

> *The disallowance of excessive attorneys' fees* to be collected from the unexpectedly large pro rata distribution *is a matter related to the administration of the Trust* because it affects the amount that each claimant will receive.

(21a) (emphasis supplied)[2].

The Petitioners' survey of federal case law has failed to reveal a single occasion in which an appellate court has affirmed the subject matter jurisdiction of a lower court to enter an order by deeming the challenged order itself as a constitutional basis for subject matter jurisdiction under section 1334(b). In order for the Disallowance Order to pass Constitutional muster under Article III, the district court's jurisdictional waters must be tested at the moment in time immediately *preceding* the order's entry -- not *after* it is entered.

If the Fourth Circuit's application of section 1334(b) is not corrected by this Court, other district courts may attempt to exercise *carte blanche* subject matter jurisdiction in bankruptcy cases simply by entering an unpopular order which results in a proceeding challenging the court's jurisdiction to enter the order in the first place. The Petitioners respectfully invoke this Court's power of supervision to rectify this most fundamental error.

II. THE FOURTH CIRCUIT'S UNDERSTANDING AS TO WHAT CONSTITUTES A PROCEEDING "ARISING IN" A CASE UNDER TITLE 11 CONFLICTS WITH THE DECISIONS OF THE FIFTH AND NINTH CIRCUIT COURTS OF APPEALS.

The court below adopted the Fifth Circuit's reasoning

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[2]Petitioners have not misconstrued the plain language of the lower court's reasoning. Even the copy-editors at West Publishing Company have understood the lower court's analysis as treating the Disallowance Order itself as the "proceeding" upon which the district court's "arising in" and "related to" jurisdiction under 28 U.S.C. § 1334(b) is based. *See* Headnotes 2 and 5, Appendix pages 3a and 3b, respectively.

in *Matter of Wood*, 825 F.2d 90 (5th Cir. 1987) to define the nature and scope of proceedings "arising in" a case under title 11. (19a). In *Wood*, the court recognized that for general purposes of determining whether a particular proceeding comes within the jurisdiction of a bankruptcy court, it is not necessary to distinguish between matters "arising under", "arising in" or "related to" a case under title 11:

> These references operate conjunctively to define the scope of jurisdiction. Therefore it is necessary only to determine whether a matter is at least "related to" the bankruptcy.

Id. at 93. The Fifth circuit considered the "arising under", "arising in" and "related to" categories as relevant to proper placement of subject matter jurisdiction in the bankruptcy and district courts following this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

In the Bankruptcy Amendments and Federal Judgeship Act of 1984, Congress divided its jurisdictional grant in 28 U.S.C. § 1334(b) into "core" proceedings, over which bankruptcy courts may exercise full judicial power, and "non-core" proceedings, over which bankruptcy courts exercise only limited power. This delegation of jurisdiction between Article I and Article III courts was accomplished by Congress in 28 U.S.C. § 157.

Section 157(b)(1) vests full judicial power in bankruptcy courts over "*core* proceedings *arising under* title 11, or *arising in* case under title 11" (emphasis supplied). The Fifth Circuit observed that section 157 appears to equate "core" proceedings with the categories of "arising under" and "arising in" proceedings identified in 28 U.S.C. § 1334(b). *Id.* at 96. The *Wood* court then concludes that although the precise meaning of "arising in" is less than clear:

> [i]t seems to be a reference to those "administrative" matters that arise *only* in bankruptcy cases. In other words, "arising in" proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.

Id. at 97 (emphasis in original), *citing* 1 Collier on Bankruptcy P. 3.01 at 3-27 (1987).

The Ninth Circuit shares the Fifth Circuit's view that proceedings "arising in" a case under title 11 refer to "core" proceedings. *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995) (claims that 'arise under' or 'arise in' title 11 are deemed to be core proceedings). While the other circuit courts do not expressly equate "core" matters with "arising in" proceedings, they do define those concepts in almost identical language. *See Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 162 (7th Cir. 1994) (holding that the domain of "arising in" jurisdiction is limited to questions that arise during the bankruptcy proceeding and concern the administration of the bankrupt estate, such as whether to discharge a debtor). *See also In re Parque Forestal Inc.*, 949 F.2d 504, 510 (1st Cir. 1991); *In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 706 (2nd Cir. 1995); *In re Guild and Gallery Plus, Inc.*, 72 F.3d 1171, 1178 (3rd Cir. 1996); *Matter of U.S. Abatement Corp.*, 79 F.3d 393, 398 (5th Cir. 1996); *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 483 (6th Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993); *Diamond Mortg. Corp. of Illinois v. Sugar*, 913 F.2d 1233, 1239 (7th Cir. 1990), *cert. denied*, 498 U.S. 1089 (1991).

While the court below claims to adopt the Fifth Circuit's test in *Wood* as its definition of "arising in" proceedings, its conclusion that the disallowance of attorneys

fees constitutes a matter "arising in" the Robins bankruptcy case is wholly unsupported by and, in fact, conflicts with, *Wood* and its progeny. The modification of a fee agreement between a former creditor and her lawyer, whether pertaining to the original settlement proceeds arising out of the personal injury tort claim or the client's contingent future interest in pro rata funds arising out of the CRF, is hardly a "core" matter.

Justice Brennan, writing for the plurality in *Marathon* described "core" bankruptcy power as "the restructuring of debtor-creditor relations." *Marathon*, 458 U.S. at 71. Contingency fee agreements between a non-creditor Dalkon Shield client and her attorney have no impact whatsoever on the restructuring of Robins' relations with its creditors.[3] Those relationships were restructured on July 26, 1988 upon entry of the district court's order confirming the plan of reorganization. Furthermore, considering the fact that the district court's Disallowance Order arose more than five years after the Robins Plan was confirmed and consummated, one could hardly maintain that this order "would have no existence outside of the bankruptcy." *Wood*, 825 F.2d at 97. (19c).[4]

There is an important additional reason why neither

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[3] *See Matter of Johns-Manville Corp.*, 68 B.R. 618, 632 (S.D.N.Y. 1986) ("[t]he fee arrangement between a claimant and his or her attorney is immaterial to these reorganization proceedings . . . [and] raise collateral disputes which this court is not empowered to rule upon").

[4] *See In re Poplar Run Five Ltd. Partnership*, 192 B.R. 848, 857 (Bankr.E.D.Va. 1995) (describing the district courts "but for" test for "arising in" jurisdiction as "over-inclusive" because it would invoke a bankruptcy court's jurisdiction simply by tracing its origin to the previous bankruptcy).

the Disallowance Order, nor the underlying personal injury tort claims from which the disallowed fees arose, may properly be construed by the lower court as an "arising in" proceeding. If, as defined by the Fifth and Ninth Circuits, "arising in" proceedings denote "core" matters of bankruptcy administration, then the lower court's opinion would allow bankruptcy judges to exercise full authority to adjudicate state contingency fee contract rights between a lawyer and client with no real connection to the bankruptcy. This result would be squarely at odds with this Court's decision in *Marathon*, 458 U.S. at 84.

This Court's intervention is requested to resolve this conflict between the court below and the appellate courts of the Fifth and Ninth Circuits.

III. THE FOURTH CIRCUIT'S JUDGMENT THAT THE DISTRICT COURT'S JURISDICTION OVER PROCEEDINGS "RELATED TO" A CASE UNDER TITLE 11 CONTINUES, WITHOUT ANY POSSIBLE EFFECT ON THE DEBTOR, AND SUBSEQUENT TO PLAN CONFIRMATION, CONFLICTS WITH THE DECISIONS OF ALL FEDERAL CIRCUIT COURTS OF APPEALS.

While federal circuit courts have articulated various definitional versions of the phrase "related to" as used by Congress in 28 U.S.C. § 1334(b), the Third Circuit's two-prong definition in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3rd Cir. 1984) has received the greatest following:

> An action is related to bankruptcy if the outcome could alter the *debtor's* rights, liabilities, options or freedom of action (either positively or negatively) *and* which in any

> way impacts upon the handling and administration of the bankrupt estate.

Id. at 994. As this Court noted in *Celotex Corp. v. Edwards*, 115 S.Ct. 1493 (1995), the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have adopted the *Pacor* test with little or no variation, and the Second and Seventh Circuits have adopted a similar test. *Id.* at 1499 n.6 (citations omitted). Although the Court agreed with the *Pacor* court that "related to" is intended to have broad application, this Court made clear that such jurisdiction is not limitless. Specifically, this Court observed that no matter which definition is used to determine the existence of "related to" jurisdiction, all of the circuits agree that "courts have no jurisdiction over proceedings that have no effect on the debtor." *Id.*

The court below concluded, however, that the "effect on the debtor" and the "effect on the estate being administered in bankruptcy" elements required by all of the other federal circuits, including its own circuit until now, were simply "too restrictive". (20a). In its place, the lower court adopted a more creative approach by substituting the Claimants Trust for the debtor and the Claimants Trust estate[5] for the former Robins bankruptcy estate. The lower

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[5] In addition to the fact that the Robins bankruptcy estate and the Claimants Trust are two entirely different legal entities, the content of the estates themselves are different. The Claimants Trust estate was funded, in large part, by a $2.055 billion payment from American Home Products Corporation ("AHP") upon the merger of Robins in an AHP subsidiary on the consummation date. Robins deposited $100 million following Plan confirmation and an additional $100 million upon Plan consummation. The Trust estate also received cash contributions from sources other than the debtor's bankruptcy estate. Aetna contributed the sum of $75 million pursuant to the terms of the *Breland* settlement agreement. E. Claiborne

court then completed its analysis by applying the *Pacor* test to the surrogate parties and concluded that "related to" jurisdiction exists within the meaning of section 1334(b) (20a-21a). Although this Court, the other federal courts of appeals, and Congress itself, has emphasized that "related to" jurisdiction must be "broadly interpreted", the Fourth Circuit's application of this principle exceeds the limits of Judicial Power under Article III of the United States Constitution.

In concluding that an "effect on the debtor" requirement was too restrictive, the lower court seems to have over-looked the fact that congressional grants of jurisdiction to the district courts are *supposed* to be restrictive. Federal courts are courts of limited jurisdiction possessing only that which is authorized by Article III of the Constitution and bestowed by statutes enacted pursuant thereto. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). Congress confers and defines the jurisdiction of the district courts, *see New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U.S. 656, 660 (1875), and Congress conferred and defined the jurisdiction of district courts over Chapter 11 cases in 28 U.S.C. § 1334.

The reason why Congress and all of the federal circuit courts have required the existence of the debtor and/or the debtor's estate as a basis for subject matter jurisdiction under § 1334 is clear. The debtor and its bankruptcy estate are indispensable parties to the voluntary Chapter 11 "case or controversy" which began upon filing of the petition. 11 U.S.C. § 301. The Chapter 11 "case" is the rehabilitation of

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Robins, Sr. and E. Claiborne Robins, Jr. together deposited $5 million in cash. Additionally, the debtor contemplated that additional "hundreds of millions" would be generated over time through a conservative investment of the Claimants Trust assets. *See generally* 1f-2f.

the debtor through a restructuring of its debts under a plan of reorganization. *In re Indian Palms Assoc.*, 61 F.3d 197, 208 (3rd Cir. 1995). Confirmation of the plan, then, represents an important jurisdictional turning-point for the district court. Upon confirmation, all property in the debtor's estate not otherwise disposed of in the plan re-vests in the debtor. 11 U.S.C. § 1141(b). Since there is no longer any property remaining in the debtor's estate after confirmation, the district court's jurisdiction over the property it had previously obtained through 28 U.S.C. § 1334(e) is lost. Therefore, after plan confirmation, there is no longer a debtor or debtor's estate which can be impacted by a "related to" proceeding. Jurisdiction under section 1334(b) necessarily lapses.

In order to discourage the continued jurisdictional expansion of "related to" jurisdiction under section 1334(b), this Court's intervention is needed.

IV. THE FEDERAL CIRCUIT COURTS DISAGREE AS TO WHETHER A DISTRICT COURT CAN ENTER AN ORDER, *SUA SPONTE*, MODIFYING A CONTINGENCY FEE AGREEMENT IN THE ABSENCE OF A CASE OR CONTROVERSY BETWEEN THE ATTORNEY AND CLIENT.

Article III, Section 2 of the United States Constitution permits federal courts to decide only "concrete legal issue, presented in actual cases where there has been actual interference" with someone's rights. *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947). The Constitution confers judicial power upon courts "to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Muskrat v. United States*, 219 U.S. 346, 356 (1911). As this Court

observed in *Moore v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 47 (1971), "[i]f no party before a court makes or suggests any contest, but rather all litigants desire the same result, there can be no case or controversy within the meaning of Article III." *Id.* at 48. .

In *Brown v. Watkins Motor Lines, Inc.*, 596 F.2d 129 (5th Cir. 1979), the plaintiff, a minor, instituted a personal injury action through his guardian. The child's parents had retained an attorney to represent their son, and entered into a one-third contingent fee agreement. Following judgment for the plaintiff, the district court, *sua sponte*, inquired into the fee agreement and reduced the attorneys fee to fifteen percent of the judgment. On appeal, the Fifth Circuit held that the trial court lacked jurisdiction to reduce the contingent contract for attorneys fees because neither the attorney nor the client had contested the contingent fee. The court vacated the order of the district court reducing the fees, holding that no case or controversy under Article III existed concerning attorneys fees. *Id.* at 132.

In the present case, the district court justified its authority to *sua sponte* enter its Disallowance Order by citing to the Seventh Circuit's decision in *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982). In *Rosquist*, the father of an injured child plaintiff retained the services of a law firm and entered into a retainer agreement providing for a contingent fee of one-third of the amount recovered. The plaintiff prevailed at trial and the defendant railroad paid the judgment into the court for distribution. *Id.* at 1109. at the court's request, plaintiff's counsel submitted a petition for attorneys fees equal to one-third of the recovery as provided in the fee agreement. Instead, the court awarded counsel less than 15 percent of the recovery. *Id.*

On appeal, the Seventh Circuit observed that the district court had retained control of the fund provided by the defendant railroad and the disposition of the fund was

unresolved. *Id.* at 1110. On this basis, the circuit court distinguished the Fifth Circuit's decision in *Brown* because there, "that case was actually over; no live controversy was before the trial court. *Id.* Instead, the Seventh Circuit relied upon the Third Circuit's decision in *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1108 (3rd Cir. 1979) for the proposition that courts have authority to examine *sua sponte* attorneys fees pursuant to their inherent supervisory powers. *Id.*

The court below did not mention the *Brown* or *Rosquist* decisions. Instead, the lower court based its decision entirely upon the Third Circuit's opinion in *Dunn* which it had previously relied upon in *Allen v. U.S.*, 606 F.2d 432 (4th Cir. 1979). Essentially, the lower court affirmed the district court's *sua sponte* Disallowance Order based upon the "well-established" principle that district courts possess "supervisory jurisdiction over contingent fee contracts for services rendered in cases before them . . .." (21a-22a).

The lower court's decision directly conflicts with prior decision of the Fifth and Seventh Circuits on the same issue. In *Brown*, the Fifth Circuit held that Article III of the United States Constitution prevented the district court from modifying a contingency fee agreement where the underlying case had been concluded and neither the attorney nor his client complained about the fee arrangement. In *Rosquist*, the Seventh Circuit held that although neither the client nor the attorney complained about the terms of the contingency fee agreement, the district court had control of the fund, the disposition of the fund remained unresolved, and the district court had a duty to examine the reasonableness of the fee agreement *sua sponte* because the plaintiff's status as a minor required the court's close supervision.

Here, however, there is no controversy between Petitioners and their clients concerning the terms of their

contingency fee agreements as they relate to the initial compensatory damage awards or proceeds from the pro rata distribution. In its Disallowance Order, the district court states that "[o]ver the years of the Trust's existence" its had received "numerous complaints from claimants and others" concerning their particular fees arrangements with their lawyers. (2b). This fact hardly constitutes a case or controversy among *all* attorneys and their Dalkon Shield clients and is insufficient to justify the district court's substantial modification of the contingency fee agreements between 10,984 lawyers (17a) and their 54,000 clients.

Additionally, on March 1, 1995, the date on which the Disallowance Order was entered, the vast majority of claimants eligible to receive the pro rata distribution had long since resolved their personal injury cases against the Trust. (14a-15a). In fact, resolution of one's claim in an amount greater than $725.00, and execution of a General Release of claims in favor of the Trust, Robins, Aetna and AHP, are absolute prerequisites to a claimant's entitlement to share in the pro rata distribution. The finality of these claimants' cases, coupled with the fact that the district court has no control over the Claimants Trust corpus, places the Disallowance Order squarely at odds with the decisions of other federal courts of appeals on this same issue.

The Petitioners also note that, contrary to the lower court's decision in *Allen*, Congress did not grant district courts "supervisory *jurisdiction* over contingency fee contracts", *see Allen*, at 435 (22a) nor was such jurisdiction conferred by the American Bar Association. *See Dunn* at 1108. Instead, federal courts have recognized that they possess a certain inherent power to supervise members of its bar to ensure that an attorney's fee arrangement with a client is reasonable. *See, e.g., Schlesinger v. Teitelbaum*, 475 F.2d 137, 141 (3rd. Cir.), *cert.denied*, 414 U.S. 1111 (1973).

Specifically, that supervisory power is exercised by

district courts over contingency fee agreements "for services rendered in cases before them." *See Allen v. United States*, 606 F.2f 432, (4th Cir. 1979). With the exception of the district court's approval of child-claimant settlements, however, not one of the more than 173,000 Dalkon Shield cases resolved through settlement, ADR, arbitration or trial as of the date of the Disallowance Order were resolved before the district court. The resolution of these cases occurred privately between the claimant, her lawyer (if represented) and the Claimants Trust, or against the Claimants Trust in arbitration rooms and court houses throughout the 50 states and several foreign countries. Thus, while the district court no doubt has a vast working knowledge of the Robins bankruptcy and the operations of the Claimants Trust, Petitioners submit that the sheer volume of Dalkon Shield cases has precluded the district court from developing an intimate knowledge of any one specific case.

This Court should grant certiorari to halt *sua sponte* judicial action in the absence of a case or controversy concerning matters not before the court.

V. THE DISTRICT COURT'S MISAPPLICATION OF FUNDAMENTAL PRINCIPLES OF DUE PROCESS OF LAW, AND THE LOWER COURT'S SANCTION OF SUCH CONDUCT, SO FAR DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The due process clause of the fifth amendment prohibits the deprivation of property without due process of law. *See Hurtado v. People of State of Cal.*, 110 U.S. 516 (1884). Providing the aggrieved party a meaningful opportunity to be heard is an integral part of the due process

protection. *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972). Professional employment contracts, such as attorney contingency fee agreements, constitute property interests which cannot be taken without due process of law. *See Kersey v. Shipley*, 673 F.2d 730, 732 (4th Cir.), *cert. denied*, 459 U.S. 836 (1982).

The premise of the district court's March 1, 1995 Disallowance Order was its conclusion that attorneys representing Dalkon Shield claimants were charging contingent fee percentages on the pro rata distribution which exceeded the bounds of reasonableness as a matter of professional ethics. (3b; 24c-25c). Every attorney who received that order, including Petitioners, was "mandatorily enjoined to mail" the Disallowance Order to each of one their Dalkon Shield clients within ten days of receipt. (6b). While the Disallowance Order provided procedures by which an attorney could seek the reinstatement of the disallowed fees (3b-6b), the district court provided *no* procedures for the Petitioners to contest the allegations of unethical fee-charging prior to mailing the order to their clients. Petitioners obeyed the district court's mandate and mailed the Disallowance Order to each of their clients. *See Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1498 (1995) (restating the "well-recognized rule" that persons subject to an injunctive over issued by a court with jurisdiction must obey that order until it is modified or reversed).

The Petitioners and their law firms have always taken the greatest care to maintain a high degree of professionalism in every transaction, whether involving a client, a court, or a member of the general public. Through these efforts over time, Petitioners have developed a strong reputation in the community for integrity, honesty and ethical behavior. For the district court to order Petitioners to publish the court's personal opinion challenging Petitioner's contingency fee agreements as unethical, without providing Petitioners any

opportunity to defend themselves by presenting evidence to the contrary, is a flagrant violation of Petitioner's due process rights.

In *Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180 (8th Cir. 1984), the Court of Appeals for the Eighth Circuit concluded that a district court judge's reprimand from the bench of three Robins officers constituted an infringement of the officers' due process liberty interests because "it was a governmental attack on their good name, reputation, honor and community standing." *Id.* at 1191. *See Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential). What the district court did to Petitioners in this case is no different.

The Disallowance Order of the district court provided Petitioners an opportunity to present evidence at an April 27, 1995 hearing to set out "the facts and legal arguments that the attorney believes would justify reinstatement of the attorneys fees claim." (4b-5b). Because the district court disallowed their fees on the ground of unreasonableness (3b), Petitioners devoted nearly six weeks of effort compiling more than ten years-worth of case-specific data to demonstrate the "reasonableness" of their contingent fee contracts.

The specific brand of evidence that the district court had to consider in evaluating Petitioner's evidence for "reasonableness" had been horn-book law in the Fourth Circuit since its decision in *Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978). In *Barber*, the court below adopted a twelve-factor analysis announced by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (1974), relevant to a district court's determination of "reasonable" attorneys fees. These guidelines were recognized to be consistent with those recommended by the American Bar Association's Code of

Professional Responsibility.[6] The Fourth Circuit made clear in *Barber* that "these factors must be considered by the district court in this circuit in arriving at a determination of reasonable attorneys fees in *any* case where such determination is necessary. *Barber*, 577 F.2d at 226. This Court has also recognized the utility of "Johnson's 'list of 12'" when assessing the reasonableness of a fee award. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989).

At the April 27, 1995 hearing, Petitioner Bergstrom, through his counsel Mr. Ronald Meshbesher, offered the district court 145 individual affidavits detailing specific facts from each of those cases in the context of the *Barber/Johnson* twelve-factor reasonableness test. The district court admitted the affidavits into evidence as a proffer of Mr. Bergstrom's testimony as to the factual matters of those specific cases, but had the following to say about their value:

> THE COURT: As you know, Judge Shelley has taken senior status now. Hopefully it will rain, and this will be great for a rainy day. He won't be able to play golf, and he will

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[6]The twelve factors are as follows: 1) The time and labor expended; 2) The novelty and difficulty of the questions raised; 3)The skill required to properly perform the legal services rendered; 4) The attorney's opportunity costs in pressing the instant litigation; 5) The customary fee for like work; 6) The attorney's expectations at the outset of the litigation; 7) The time limitations imposed by the client or circumstances; 8) The amount in controversy and the results obtained; 9) The experience, reputation and ability of the attorney; 10) The undesirability of the case within the legal community in which the suit arose; 11) The nature and length of the professional relationship between attorney and client; and 12) Attorneys' fees awards in similar cases. *Barber*, 577 F.2d at 226, n.28; *Johnson*, 488 F.2d at 717-19.

> pass it on to me for whatever it is worth. You don't think that I am going to read all of this.
>
> MR. MESHBESHER: I don't know. We are doing the best we can.
>
> THE COURT: I want to be at [sic] truthful as I can. I am not going to read it all. But Shelley has got to do something on a rainy day.

The district court invited Petitioners' into his court to offer evidence as to the reasonableness of their contingent fee contracts under the well-established evidentiary standard accepted by most federal courts. Yet the district court was unwilling to even review the evidence Petitioners had prepared. This process can hardly be described as a meaningful opportunity to be heard.

While the district court recognized its obligation to consider the *Barber* factors, and proceeded to do so in its May 2, 1995 opinion, the court applied these factors only to the pro rata distribution portion of the claimants awards and not to the entire work performed by the Petitioners in obtaining the initial compensatory damage award. (26c-28c). This bifurcation of an attorney's work-product is unprecedented. A court cannot isolate a select portion of a clients recovery and then apply a reasonableness analysis only to that part. If that were a permissible standard, a district court could disallow attorneys fees, for example, on the trebled portion of a plaintiff's damage award under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and then claim that the lawyers did nothing to earn that portion of the award because Congress, not the lawyer, was responsible for the trebling effect.

In this case, both the initial distribution and the pro

rata distribution result from *one* claim pursued by claimants' attorneys. The results obtained for the claimants includes both distributions. Furthermore, the size of the pro rata distribution to be received by a claimant is directly proportional to the size of the claimant's initial award. The pro rata distribution, therefore, directly results from the Petitioners' prior efforts on behalf of their clients.

Finally, the court below noted that there was a "serious question" as to whether the twelve *Barber/Johnson* factors should apply to a review of the reasonableness of attorneys fees generated from the pro rata distribution. (29a). Instead, the circuit court recommended *Allen v. United States*, 606 F.2d 432 (4th Cir. 1979) as a more appropriate method of analysis, because that opinion "deals with contingent fees and places upon the district court the obligation to limit such fees to a reasonable amount." (29a-30a).

In *Allen*, plaintiff's counsel sought guidance from the district court in setting the amount of his contingent fee which had previously been set at 25 percent pursuant to an oral contingency fee agreement. When the defendant government appealed the district court's order finding a 20 percent fee to be reasonable, the Fourth Circuit vacated the district court's decision finding it to be an abuse of discretion to allow a fee "without carefully considering the factors relevant to fair compensation." *Id.* at 435. Interestingly, the court below directed the district court's attention to the *Barber v. Kimbrell's* decision for guidance on remand. *Id.*

The contingent fee represents the only means by which a large segment of this nation's citizens will ever gain access to the services of a lawyer. That conduit will begin to close, however, if district courts are allowed, without a complaint from anyone, to modify contingent fee agreements simply because the court feels it necessary or proper to do so. This Court's intercession is required to prevent such

interference, no matter how well-intended it may be.

CONCLUSION

For the reasons stated, Petitioners request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: September 17, 1996 *Attorneys for Petitioners*

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In re A.H. ROBINS COMPANY, INCORPORATED, Debtor.

Paul W. BERGSTROM; A. Russell Blank, Thomas J. Brandi; Mari C. Bush; William D. Cook, Peter Danziger; Glenn A. Dorfman; J. Michael Egan; Paul E. Fagan; Michael Fields; Joseph S. Friedberg; Michael Friedman; William C. Gage; Abraham N. Goldman and Associates, Limited, Jeffrey Holl; James B. Hovland; Arthur C. Johnson; Charles Johnson; Rodney A. Klein; Martina Langley; Edward C.Y. Lau; Stan Linker; Henri E. Norris; Ralph Pittle; Michael A. Pretl; Ron Schnieder; Gregory J. Semanko; Sybil Shainwald; Andrew S. Zieve, Appellants,

v.

DALKON SHIELD CLAIMANTS TRUST, Trust-Appellee.

In re A.H. ROBINS COMPANY, Incorporated, Debtor.

Glenn A. DORFMAN, Appellant,

v.

DALKON SHIELD CLAIMANTS TRUST, Trust-Appellee.

In re A.H. ROBINS COMPANY, Incorporated, Debtor.

MEDICAL LEGAL CONSULTANTS OF WASHINGTON, Appellant,

v.

DALKON SHIELD CLAIMANTS TRUST, Trust-Appellee.

In re A.H. ROBINS COMPANY, Incorporated, Debtor.

LEVIN, FISHBEIN, SEDRAN & BERMAN, Appellant,

v.

DALKON SHIELD CLAIMANTS TRUST, Trust-Appellee.

In re A.H. ROBINS COMPANY, Incorporated, Debtor.

Michael R. TUCKER, Appellant,

v.

DALKON SHIELD CLAIMANTS TRUST, Trust-Appellee.

Nos. 95-2239, 95-2032, 95-2033, 95-2236, 95-2240.

United States Court of Appeals, Fourth Circuit.

Argued March 6, 1996.
Decided June 20, 1996.

Attorneys for mass tort claimants filed motions to reinstate contingency fees, which had been disallowed as unreasonable, for pro rata distribution of surplus in Dalkon Shield Claimants Trust, which had been set up to pay claims against Chapter 11 debtor. The United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., Senior District Judge, 182 B.R. 128, in retained proceeding, denied motion to reinstate fees. Attorneys appealed. The Court of Appeals, Chapman, Senior Circuit Judge, held that: (1) court had jurisdiction to limit contingency fees; (2) fee limitation did not violate attorneys' due process rights; (3) fee limitation did not modify Chapter 11 plan; (4) court's findings of fact were supported by evidence; and (5) court properly determined reasonableness of fees.

Affirmed.

1. Federal Courts 776

Jurisdictional question presented on appeal is reviewed de novo.

2. Bankruptcy 2045

Proper amount of attorney fees for pro rata, distribution to mass tort claimants out of surplus in trust created to pay claims against Chapter 11 debtor, after claimants had been paid and their attorneys had collected contingent fees out of prior payments, was matter "arising in" Title 11, for purposes of bankruptcy jurisdiction, since proceeding would have no practical existence but for bankruptcy. 28 U.S.C.A. § 1334(b).

3. Bankruptcy 2043(1)

Proceedings "arising in" Title 11 are those proceedings that are not based on any right expressly created by Title 11,

but nevertheless, would have no existence outside of bankruptcy. 28 U.S.C.A. § 1334(b).

4. Bankruptcy 2043(3)

Cases "related to" Title 11 include proceedings in which outcome could have effect upon estate being administered under Title 11. 28 U.S.C.A. § 1334(b).

5. Bankruptcy 2045, 3570

Proper amount of attorney fees for pro rata distribution to mass tort claimants out of surplus in trust created to pay claims against Chapter 11 debtor, after claimants had been paid and their attorneys had collected contingent fees out of such prior payments, was matter "related to" bankruptcy case, for purposes of bankruptcy jurisdiction, since proceeding could have effect on bankruptcy estate being administered; although trust had been created to take place of debtor, bankruptcy case would remain open until all claims had been paid and trust had been dissolved, and disallowance of fees would impact on amount each claimant would receive. 28 U.S.C.A. § 1334(b),

6. Bankruptcy 3570

Jurisdiction to supervise trust created to pay mass tort claims against Chapter 11 debtor was not lost upon confirmation of debtor's bankruptcy plan, since exclusive jurisdiction to resolve controversies and disputes regarding interpretation and implementation of plan was retained. 28 U.S.C.A. § 1334(b).

7. Federal Civil Procedure 2737.5

Federal district courts have inherent power and obligation to limit attorney fees to reasonable amount.

8. Bankruptcy 3570

Court that was knowledgeable as to litigation and settlement of mass tort suit clearly had authority to determine whether contingent attorney fees for unexpectedly large pro rata distribution of extra funds in trust set up by Chapter 11 plan to pay claims, after claimants had been paid on claims and their attorneys had collected contingent fees out of prior payments, were reasonable.

9. Bankruptcy 3204, 3570
Constitutional Law 306(4)

Sua sponte order limiting contingent attorney fees for pro rata payments made to mass tort claimants from excess in trust set up by Chapter 11 plan to pay claims, after claimants had been paid and their attorneys had collected contingent fees out of prior payments, did not violate attorneys' due process rights, since order was treated as rule to show cause as to why fees should not be limited, ample notice of hearing at which attorneys could respond was given, and attorneys were given opportunity at hearing to present evidence and to cross-examine witnesses. U.S.C.A. Const.Amend. 5.

10. Bankruptcy 3205, 3570
Constitutional Law 306(4)

Requiring attorneys to prove that their one-third contingent fees for pro rata distributions from surplus in trust set up by Chapter 11 plan to pay mass tort claims, after claimants had been paid and their attorneys had collected contingent fees out of prior payments, were reasonable, did not violate their due process rights, since order to show cause as to reasonableness was based on claimants' complaints about level of attorney fees being charged. U.S.C.A. Const.Amend. 5.

11. Bankruptcy 2126, 3569

Provision prohibiting modification of Chapter 11 plan after substantial consummation does not take away court's power to review attorney fees charged in bankruptcy proceeding or to issue such orders as may be appropriate to carry out provisions of Bankruptcy Act. Bankr.Code, 11 U.S.C.A. §§ 105, 1127(b).

12. Bankruptcy 3569, 3570

Limitation of attorney fees from pro rata distribution of surplus in trust set up to pay mass tort claims against Chapter 11 debtor, after claimants had been paid and their attorneys had collected contingent fees out of prior payments, was not modification of bankruptcy plan, since there was no conflict between limitation on fees and plan provision requiring claimants to pay their own attorney fees. Bankr.Code, 11 U.S.C.A. § 1127(b).

13. Bankruptcy 3570

Chapter 11 plan provision stating that mass tort claimants, who sought to recover from debtor, would bear their attorney fees in connection with claims resolution process, except as provided otherwise by law, subjected matter of fees to general law and court's powers regarding fees.

14. Federal Courts 853

Trial court's findings of fact will be affirmed unless review of entire record leaves reviewing court with definite and firm conviction that mistake has been committed. Fed. Rules Civ.Proc.Rule 52, 28 U.S.C.A.

15. Bankruptcy 3205, 3570

Limitation of contingent attorney fees for pro rata distribution of surplus in trust set up to pay mass tort claims against Chapter 11 debtor, after claimants had been paid and

their attorneys had collected contingent fees out of prior payments, was supported by evidence of court's awareness that little additional legal assistance would be required to receive compensation from trust, that claimants had complained about level of attorney fees charged, and that fees in excess of ten percent would be considered unreasonable.

16. Bankruptcy 3200, 3570

Trial court properly determined that contingent attorney fees of more than ten percent of pro rata distribution to mass tort claimants of excess in trust set up to pay claims against Chapter 11 debtor, after claimants had been paid and their attorneys had collected contingent fees out of prior payments, were unreasonable, since it determined that majority of claims were settled without services of attorney, there was little uncertainty involved as with most contingency cases, and attorneys had already collected one third of claimants' fully settled claims.

17. Federal Courts 878

Because trial court has close and intimate knowledge of efforts expended and value of services rendered, fee award must not be overturned unless it is clearly wrong.

ARGUED: Benjamin C. Ackerly, Sr., Hunton & Williams, Richmond, Virginia, for Appellants. John Calvin Jeffries, Jr., University Of Virginia School Of Law, Charlottesville, Virginia, for Appellee. **ON BRIEF:** Lewis T. Booker, Tyler P. Brown, Hunton & Williams, Richmond, Virginia, for Appellants. George A. Rutherglen, University Of Virginia School Of Law, Charlottesville, Virginia; Orran Lee Brown, Richmond, Virginia, for Appellee.

Before RUSSELL and WIDENER, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge CHAPMAN wrote the opinion, in which Judge RUSSELL and Judge WIDENER joined.

OPINION

CHAPMAN, Senior Circuit Judge:

Four hundred years ago William Shakespeare observed that lawyers "dream on fees."* During the ensuing centuries, few lawyers, even in their wildest dreams, have envisioned fees such as those that have resulted from mass tort litigation. This appeal is taken by 29 attorneys, who have represented claimants seeking recovery from the Dalkon Shield Claimants' Trust (Trust) for injuries sustained because of the use of the intrauterine contraceptive device known as the Dalkon Shield and manufactured and marketed by A.H. Robins Company, Inc. (Robins). These 29 appellants-attorneys have already received fees in excess of $90,000,000 on claims that have been paid to their clients in excess of $270,000,000. Because claims of other clients are still pending, these amounts will increase.

It now appears certain that the Trust will have a sizable amount remaining after payment of all claims, and under its terms, claimants who received more than the *de minimis* amount of $750 will receive an additional payment or pro rata distributions with no additional effort by the claimants or by their attorneys. This additional payment will be as much as 75 percent of the original settlement amount for each claimant and may approach 100 percent, thereby doubling the

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* Romeo and Juliet, Act 1, Scene 4.

settlement heretofore made. The district court, sitting in bankruptcy after having retained jurisdiction over the administration of the settlement of the Dalkon Shield claims, has limited attorneys' fees on these additional pro rata payments to ten percent. The appellants claim that the district court lacks jurisdiction to enter such an order and that there was no factual basis to support a reduction of their contingent fees from one-third or more to only ten percent of these additional funds. The total amount of additional fees to be collected by the 29 appellants based on a 75 percent pro rata payment would be $19,875,000, if the court's limit of ten percent is sustained. If the appellants receive a fee of one-third of the new payments, they will obtain additional fees in excess of $66,000,000. Under the district courts order, the 29 attorneys will have received total compensation of $110,000,000 resulting from the Dalkon Shield litigation, but they are appealing and assert that the district court has deprived them of due process of law by not allowing them to collect an additional $46,000,000. We find no merit to the appellants' contentions, and we affirm.

I.

From early 1971 to 1974, Robins manufactured and sold worldwide an intrauterine contraceptive device known as the Dalkon Shield. Manufacture and sale of this device stopped because of complaints and law suits of women claiming injuries arising out of its use. These law suits continued to multiply until the company was overwhelmed with the effort and the expense of defending and settling claims and paying judgments in state and federal courts throughout the land and in foreign countries. In August 1985, Robins filed a petition under Chapter 11 of the Bankruptcy Code. This stayed all suits against the company.

While attempting to reorganize under Chapter 11, Robins managed its affairs and operated its businesses as a debtor-in-possession under 11 U.S.C. §§ 1107 and 1108 with oversight by a court-appointed examiner. After extensive negotiations, a plan of reorganization dated March 28, 1988 (Plan), was filed accompanied by the Sixth Amended and Restated Disclosure Statement pursuant to § 1125 of the Bankruptcy Code. Under this Plan, Robins was merged into a subsidiary of American Home Products Corporation (AHP). The Plan created the Claims Resolution Facility (CRF), a Claimants' Trust and Other Claimants' Trust which were funded by AHP in the amount of $2.475 billion to pay the valid Dalkon Shield claims. Each Trust is non-reversionary, and the entire corpus and all interest and income earned thereon must be used to pay claims and the costs of administration. Each Trust is charged with the responsibility of evaluating each claim and deciding what amount, if any, to award the claimant. Any funds remaining after all claims and expenses have been paid is to be distributed pro rata to claimants in lieu of punitive damages, which are not otherwise available under the Plan. These pro rata payments will go to those claimants who did not accept Option 1, which provided quick settlement for minor claims and paid $725 on minimal proof of Dalkon Shield use and injury.

From the beginning, the United States District Court for the Eastern District of Virginia retained jurisdiction of most issues arising out of this bankruptcy and the United States District Judge and the United States Bankruptcy Judge have been sitting together and deciding those legal issues that have been presented. The district court has retained continuing supervision of the CRF and the Trust.

There has been great concern and difference of opinion as to the amount of money that would be required to fund the Trust so as to pay all valid claims and cover the cost of administration. Prior to approving the amount to be placed in

the Trust, the district court, sitting in bankruptcy, heard expert testimony as to the total recovery value of all Dalkon Shield claims. The expert opinions ranged from 600 million dollars to 7 billion dollars. Attorneys for the claimants appealed the district court's finding that $2.475 billion would be sufficient, because their experts had insisted on a figure of 4.2 to 7 billion dollars.

We affirmed the district court's amount in *In re A.H. Robins Co.*, 880 F.2d 694 (1989), *cert. denied*, 493 U.S. 959, 110 S.Ct. 376,107 L.Ed.2d 362 (1989). The funds were contributed to the Trust by American Home Products, and the Trust began to pay claims. From the beginning, the Trustees were fearful that the money would not be sufficient and requested the district court to enter Administrative Order No. 1 of July 1, 1991, which included a hold back provision which provided in part:

> . . . In order to assure the continued availability of funds to pay all valid Dalkon Shield personal injury claims, and in order to further the other proper purposes of the plan, Trust and CRF, in satisfaction of all awards and judgments . . . obtained as a result of Arbitration or Litigation, the Trust shall
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> a. Pay initially only that portion of such award or judgment which does not exceed the greater of $10,000 or the final settlement offer made by the Trust under Option 3, Section E.4 of the CRF. . . .

(Paragraph 13 of Administrative Order No. 1.)

Certain claimants appealed, and we approved this order *In re: A.H. Robins, Inc.*, 42 F.3d 870, 872 (1994). At the same time, the Trustees also held back their compensation because of their concern as to the sufficiency of funds. However, as settlement of claims progressed, the need for such hold backs

no longer existed and all amounts held back from payments to claimants have now been restored and paid in full.

The record reflects that the Trustees have done an excellent job of administration. They have minimized administrative expenses, engaged excellent financial consultants, and earned over $800,000,000 by investing the Trust funds. They have also set in place an effective regimen for evaluating and paying the valid claims of persons who suffered from use of the Dalkon Shield. The Claims Resolution Facility was designed:

> to provide all persons full payment of valid claims at the earliest possible time consistent with the efficient design and implementation of the Claims Resolution Facility. This purpose is to be achieved by (1) providing an efficient economical mechanism for liquidating claims which favors settlement over arbitration and litigation thereby reducing transaction costs, (2) providing claimants with an attractive alternative to trial by jury where settlement is not achieved, (3) providing fair and equitable compensation based upon historic values, updated by current developments, to persons injured by the Dalkon Shield, and (4) providing no compensation to persons not injured by the Dalkon Shield. The Trustees shall, as practicable, design and implement a facility for resolution of Dalkon Shield claims. The facility is to be designed and operated in accordance with the guidelines set forth below. (CRF-1 Purpose.)

The CRF gave claimants three options. Most claimants chose Option 1 (Short Form/Instant Offer) which provided a quick settlement of $725 on minimal proof of Dalkon Shield use and injury. This option disposed of more than 119,000 claims.

> Option 2 (Claim Form/Tailored Offer) permitted claimants who elect to do so, to receive a specified payment in accordance with a schedule. The schedule shall include specified settlement amounts for each of the injuries on Exhibit A hereto. In addition, the Trustees may prepare a schedule that varies the award for the same injuries

according to the type and volume of documentation the claimant submits.

Recovery under this option was limited to $5,500. (CRF-2.)

Option 3 (Complete Form/Early Evaluation/Offer/Arbitration/Trial) provided that:

> the claimant shall submit (1) a completed claimant information form, (2) all Medical Records of any injuries and damages alleged to have resulted from use of the Dalkon Shield by a claimant, and (3) Medical Records or Medical Evidence regarding use of a Dalkon Shield by the claimant or an affidavit of the claimant stating that she used the Dalkon Shield and explaining the basis of this knowledge. (CRF-2.)

Option 3 claims were evaluated by developing a profile of the claim based upon criteria relevant to the case value, by comparing the profile to corresponding profiles based upon historical data, and by establishing an amount at which the comparison of the claimant's profile and quality of evidence supported the claim.

Option 3 provided that as soon as practicable the Trust would mail to the claimant a statement of the amount, if any, which the Trust offered to pay in satisfaction of the claim and the report setting forth the reasons therefor. Option 3 offers were nonnegotiable and were extended to the claimant as a "best and final offer and not an opening bid."

If settlement was not reached on the original offer, the Trust would undertake an in-depth review of the claim and invite the claimant and claimant's representative to a voluntary settlement conference or any other voluntary alternate dispute resolution process as appropriate. If settlement was not reached at this level, then the claimant was to select either binding arbitration or a trial. (CRF-3.)

The use of these options resulted in the settlement of the vast majority of the claims promptly, economically, and with low transaction costs. CRF designed and tested claim forms

that were understandable to claimants, whether or not represented by counsel. Claimants were provided with instructions, newsletters, and telephone numbers to call for assistance. The claimants were advised early on to begin collecting their medical records and other evidence of injury and damage.

Under rules adopted by the Trust, claims were evaluated and paid on information submitted. These procedures reduced the role of the claimants' attorneys to the point that they were involved in finding the client, assembling the medical records, bills and other evidence of damage and transmitting these documents to CRF. In a small percent of the claims, attorneys represented clients who proceeded to binding arbitration or trial.

Option 3 was quite successful. The offers made by CRF had an overall acceptance rate of 84 percent of the offers over $20,000, 96 percent were accepted and 99 percent of offers over $60,000 were accepted.

The average Option 3 settlement was $33,150 for claimants who were not represented by counsel. Of claimants who were represented by counsel, the average payment under Option 3 was $39,047. All claimants who have settled by accepting offers from CRF have signed general releases acknowledging that their settlement covered all claims. All amounts paid through alternate dispute resolution, arbitration or trial have been paid as full settlement of all claims. None of these payments that were made, nor any of the releases that were signed, mentioned or held out any hope of additional payments or a pro rata distribution of any excess that might remain in the Trust.

The appellants-attorneys have not been restricted in any way in collecting their contingent fees from their clients on all payments heretofore made through the CRF. As of March 31, 1995, the Trust had paid out in excess of 1.3 billion dollars to settle 173,321 claims. On that date, the Trust had 1.4 billion

dollars in assets to cover the remaining 19,000 claims. At this point it became obvious that there would be a large pro rata distribution as directed by Section G.14 of the CRF which provides:

> Claimants who have claims for contingent damages which are meritorious and which are not time-barred shall have first call on the funds in the Trust. To the extent funds remain after all such claims are paid in full, meritorious compensatory damage claims which are time-barred shall then be administered and paid from the funds of the Trust. To the extent funds (not including Aetna Insurance) remain after such claims are paid in full, the remaining funds shall be paid in lieu of punitive damages to all claimants (other than holders of Dalkon Shield Liquidated Claims) who receive compensatory damage awards from the Trust, on a pro rata basis consistent with such awards. The Trustees may, in their discretion, set a de minimis amount below which such payments need not be made.

The Trustees directed that all claimants who received more than the $725 under Option 1 would participate in the pro rata distribution. Each claimant will receive, without further effort by the claimant or claimant's attorney, a pro rata payment of an additional sum estimated to be 75 percent or more of the original settlement received by such claimant. These excess funds result largely from the $800,000,000 earned on investments and the control of administrative costs which were $200,000,000 less than originally projected.

The district court received quarterly reports from the Trust and was kept aware of progress in settling claims and of amounts being expended. Based upon these reports, which showed a large excess likely to remain after payment of all valid claims, and being aware of the pro rata provisions of Section G.14, the district court entered its March 1, 1995 order which provided in part:

No additional effort will be required of the claimants or their counsel to receive the pro rata distribution. Over the years of the Trust's existence, the court has also received numerous complaints from claimants and others regarding the level of fees charged to claimants, but has avoided in becoming entangled in such disputes.

In light of the foregoing, the court has reviewed the issue of whether it would be reasonable for the attorneys representing Dalkon Shield claimants to charge and receive additional attorneys' fees out of the pro rata distribution. On the basis of this analysis, in the exercise of this court's retained jurisdiction, it is ORDERED and ADJUDGED as follows:

1. *The Court's* Authority *to Regulate Fees.* The court's authority to supervise members of the bar, its inherent powers to regulate attorney-client relations and compliance with ethical standards by attorneys, the equitable powers of the court under 11 U.S.C. § 105(a) and the inherent equitable powers of the court, render the contingent fee contract of attorneys representing Dalkon Shield subject to the supervision of this court to ensure that excessive or unreasonable fees are not charged or recovered by counsel.

2. *Allowance of Unreasonable Attorneys' Fees Out of the Pro Rata Distribution.* The court has determined, based on the foregoing, that attorneys' fees charged by counsel to Dalkon Shield claimants out of any pro rata distribution by the Trust under § G.14 of the CRF in excess of ten percent of the pro rata distribution would be unreasonable and thus are hereby disallowed. Unless reinstated under the terms of this order, counsel for Dalkon Shield Personal Injury Claimants are prohibited from charging or receiving, directly or indirectly, any compensation or fees, based upon or out of any pro rata distribution received by a Dalkon Shield Personal Injury Claimant from the Trust under § G.14 of the CRF, in

excess of ten percent of such pro rata distribution by the Trust to the claimant (with such disallowed fees referred to hereinafter in this order as "Disallowed Fees").

3. *Objection to Disallowance.* Any attorney representing the Dalkon Shield Personal Injury Claimant who objects to this disallowance and wishes to seek reinstatement of his or her claim to disallowed fees must follow all of the procedures set out in the remainder of this order.

The court provided a process for seeking reinstatement of larger contingent fees and set a hearing on April 27, 1995 on any motions for reinstatement of fees in excess of ten percent

This order was mailed directly to 10,984 attorneys, who appeared on the records of the Trust as having represented Dalkon Shield claimants. Of this number, 76 filed motions to reinstate their original contingent fees. Prior to the April hearing, attorneys for the present 29 attorneys-appellants filed a motion to vacate the March 1 order. At the hearing of April 27, 1995, the March 1, 1995 order was treated as a Rule to Show Cause as to why the attorneys' fees on any pro rata distribution should not be limited to ten percent.

At the April 27 hearing, the district court invited the appellants to present any evidence they desired, but their counsel replied that none would be presented. The Trust then called Georgene M. Vairo, Associate Dean and Professor of Law at Fordham University School of Law. She is and, since 1988, has been the chairperson of the Trustees administering the Dalkon Shield Claimants' Trust. She testified at length about the activities of the Trust, the CRF, settlement of claims, amounts paid, excess expected, investment results, etc. She was subjected to cross examination. She also presented various charts and figures concerning the payment of claims and the administration of the Trust.

On May 2, 1995, the district court issued its order denying the motion to vacate the March 1 order and the request to

reinstate fees. On May 22, 1995, the district court found that its prior orders as to fees were final and appealable. The present appellants then appealed.

II.

The appellants raised the following exceptions: (1) the bankruptcy court lacked jurisdiction to enter the March 1 order; (2) the procedure set forth in the March 1 order violated due process; (3) the bankruptcy court's March 1 order improperly modified the plan and amended the Trust; (4) the bankruptcy court lacked any evidentiary basis for the factual conclusions contained in the March 1 and May 2 order; and (5) the bankruptcy court erred in applying the reasonableness test set forth in *Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978) solely to work that will be performed by claimants' attorneys in obtaining the pro rata distribution, rather than to all the work performed by the attorneys throughout the representation of their clients.

A. *Jurisdiction under Title 28 U.S.C. § 1334.*

[1, 2] The jurisdictional question presented in this appeal is reviewed *de novo*. *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 865 (4th Cir.1994). Appellants argue that the district court lacked jurisdiction under § 1334 to enter its March 1, 1995 order, which interferes with the appellant's contingent fee arrangements with their clients. Section 1334(b) provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not

exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The present question concerning the amount of the attorneys' fees to be charged and collected on the pro rata distribution to claimants out of the Trust, subsequent to the claimants having already been paid and their attorneys having collected contingent fees out of such prior payments and settlements of their claims, is a matter "arising in" and "related to" a case under Title 11.

[3] Proceedings "arising in" Title 11 are those proceedings that "are not based on any right expressly created by Title 11, but nevertheless, would have no existence outside of the bankruptcy." *Matter of Wood*, 825 F.2d 90, 97 (5th Cir.1987).

[4] The "related to" category of cases is quite broad and includes proceedings in which the outcome could have an effect upon the estate being administered under Title 11. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir.1984).

> [T]he proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedoms of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Id.

We have held that the "related to" jurisdiction is to be "broadly interpreted." *See In re Johnson*, 960 F.2d 396, 403 (4th Cir.1992).

The present proceeding or controversy arises in Title 11, and the district court has jurisdiction because it "would have no practical existence but for the bankruptcy." The A.H. Robins Title 11 bankruptcy produced the Trust and the CRF, which established the expedited procedures required to

process and pay almost 200,000 claims from all over the world. This unusual bankruptcy resulted from worldwide use of a product by hundreds of thousands of women and made it possible for the attorneys to advertise for clients in publications of general interest to women. The three options for handling cases and the use of claimants' profiles and "best and final offers" that were nonnegotiable allowed the CRF to handle thousands of claims promptly and also made it possible for appellant-attorneys to represent a multitude of claimants without expending the time, effort and resources that would have been required to try individual cases or to negotiate individual settlements in the usual "offer and counter offer" way.

Without the bankruptcy, there would have been no pro rata distribution. This is unique to this bankruptcy proceeding. The district court's order limiting the percent that the plaintiffs' may receive in fees out of these pro rata distributions could not have occurred but for the bankruptcy and, therefore, said order "arises in" the bankruptcy, and the court has jurisdiction under § 1334(b).

[5] The court also has jurisdiction under the same section because the proceeding is "related to" a case in bankruptcy, and the proceeding could have an effect on the estate being administered. The appellants-attorneys argue that there is no jurisdiction under the "related to" prong because there is no estate being administered, only the Trust remains. This argument is too restrictive. A.H. Robins has gone out of existence, but the Dalkon Shield Claimant Trust has taken its place, and all claims against Robins have been transferred to the Trust, and the Trust is obligated to discharge these obligations. The bankruptcy case remains open until all claims have been paid and the Trust dissolved under its terms. The present controversy could have an effect on the operation of the Trust, and it impacts its handling and administration and is

therefore "related to" the bankruptcy within the meaning of § 1334(b).

The disallowance of excessive attorneys' fees to be collected from the unexpectedly large pro rata distribution is a matter related to the administration of the Trust because it affects the amount that each claimant will receive. The Trust was created to protect and pay those persons who had been damaged by use of the Dalkon Shield. The efforts of the Trust to settle the remaining claims could easily be affected if the remaining claimants are aware that any attorneys' fees out of the pro rata distribution will be limited to ten percent. In 1991, when it appeared that funds in the Trust may not be sufficient to pay all claims, we approved the district court's supervision of the Trust and the entry of the order holding back any award or judgment in excess of $10,000. *See In re A.H. Robins Co., Inc.*, 42 F.3d 870 (4th Cir.1994). Proceedings to hold back payments or to make additional payments in the form of the pro rata distribution both relate to the administration of the bankruptcy and support jurisdiction.

[6] We find no merit to the appellant's argument that once the plan was confirmed, the district court lost jurisdiction. Under § 8.05 of the Plan and the order of July 26, 1988 confirming the Plan, the district court retained exclusive jurisdiction to resolve controversies and disputes regarding interpretation and implementation of the Plan. In numerous appeals, we have disallowed challenges to the district court's supervision of the Trust. *See In re A.H. Robins Co., Inc.* 42 F.3d 870 (4th Cir.1994); *In re A.H. Robins Co., Inc.*, 880 F.2d 769 (4th Cir.1989); and *In re A.H. Robins Co., Inc.*, 880 F.2d 779 (4th Cir.1989).

[7] Appellants also challenge the authority and jurisdiction of the district court to limit their fees. They are a little late with this argument because the law of this circuit has long

been clear that federal district courts have inherent power and an obligation to limit attorneys' fees to a reasonable amount. In *Allen v. United States*, 606 F.2d 432 (4th Cir.1979), we concluded:

> The district courts' supervisory jurisdiction over contingent fee contracts for services rendered in cases before them is well-established. *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1108 (3d Cir.1979), succinctly restates the general principles pertaining to this authority:
>
> > Because contingency fee agreements are of special concern to the courts and are not to be enforced on the same basis as are ordinary commercial contracts, *Spilker v. Hankin*, 88 U.S.App. D.C. 206, 210, 188 F.2d 35, 39 (D.C.Cir.1951), courts have the power to monitor such contracts either through rule-making or on an ad hoc basis. Canon 13 of the Canons of Professional Ethics, promulgated by the American Bar Association, recognizes that an attorney is free to enter into such arrangements. The Canon, however, qualifies the right with the proviso that they are subject to the "supervision of the courts, as to [their] reasonableness." *See Fitzgerald v. Freeman*, 409 F.2d 427 (7th Cir.), *cert. denied*, 396 U.S. 875, 90 S.Ct. 151, 24 L.Ed.2d 134 (1969) (court not bound by contingent fee agreement executed in conjunction with substitution of new counsel and could, in light of Canons 13 and 34, award fees on *quantum meruit* basis). We indicated the source of the power in *Schlesinger v. Teitelbaum*, 475 F.2d 137, 141 (3d Cir.), *cert. denied*, 414 U.S. 1111, 94 S.Ct. 840, 38 L.Ed.2d 738 (1973), where we stated that, "in its supervisory power over the members of its bar, a court has jurisdiction of certain activities of [its] members, including the charges of contingent fees."

* * *

> We also reject the argument advanced by counsel for the plaintiffs that a court can do no more than enforce the terms of the contingent fee contract. Associated with the court's power to allocate part of the recovery to counsel is its obligation to limit the fee to a reasonable amount. A court abuses its discretion if it allows a fee without carefully considering the factors relevant to fair compensation. *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978).

Id. at 435.

[8] In the present case, the district court, acting upon its extensive knowledge of this litigation, of the facts presented at the hearing concerning the settlement process, of the first and final offer being made by the Trust after comparing a claimant's case with the profile of others similarly situated, and of the unexpectedly large pro rata distribution, simply applied the settled principle that attorneys' fees must be reasonable. The court had this clear authority. This authority is so clear that it is not necessary to discuss the additional sources of such authority such as the federal court's power to enforce state law standards of ethical conduct and a federal district court's inherent power to regulate the conduct of the court's officers, including attorneys.

B. *Due Process.*

[9] We find no merit to the argument the procedure set forth in the March 1, 1995 order of the district court denied the appellants-attorneys due process. Although the order was issued *sua sponte*, the record is clear that the attorneys and the court treated this order as a Rule to Show Cause as to why the attorneys' fees on the pro rata distributions should not be limited to ten percent. There was ample notice of the April 27, 1995 hearing at which the attorneys could respond to the

Rule to Show Cause. They were given the opportunity to present evidence in support of their position and to cross examine Professor Vario. The court heard legal argument from the appellants in support of their position. The attorneys had sufficient time to prepare for the hearing, and although they presented no evidence and confined themselves to legal argument, this was their choice, freely made.

The appellants requested and received a stay of individual motions for reinstatement of fees pending a decision on this appeal. At that time they will have the opportunity to present evidence to support a claim for a larger fee based upon the facts in particular cases.

[10] It was not a violation of due process for the district court to place upon the appellants-attorneys the burden of proving that their one-third contingent fees from the pro rata distributions were reasonable.

> An attorney has the burden of proof as to the reasonableness of his fee when he sues to recover from his client. This allocation of the burden of proof is premised on the relationship of trust owed by a lawyer to his client, with concomitant obligation to charge only a reasonable fee whether the arrangement be contingent or otherwise. This approach is at the very heart of the special relationship between attorney and client.

McKenzie Construction, Inc. v. Maynard, 758 F.2d 97, 100 (3d Cir.1985).

Although this is not a suit between an attorney and a client as to the reasonableness of a fee, the burden of proof remains with the attorney to establish reasonableness. The March 1, 1995 order of the district court found that a number of claimants had complained to the court about the level of attorneys' fees being charged. This finding supported the Rule to Show Cause and justified the district court in placing the burden of proving reasonableness upon those seeking

additional millions of dollars in fees in this unusual situation where clients are receiving additional amounts without any additional legal services being rendered by the attorneys.

C. *Modification of Plan by the District Court Order of March 1, 1995.*

[11] Appellants contend that the district court's March 1, 1995 order improperly modified the confirmed Plan and amended the Trust, because the order affects the division of Plan funds between a claimant and her attorney. They argue that the Plan was the result of extensive negotiations and approved by a vote of the creditors, and as such it may not be modified after it has been substantially consummated. They cite 11 U.S.C. § 1127(b):

> The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title.

They assert that the Plan has been substantially consummated and that the guidelines governing the Claims Resolution Facility provide:

> 8. Costs. The Trust and the claimants shall each bear their own costs, expenses, and attorneys' fees in connection with the claims resolution process, except as provided otherwise by law.

Appellants read too much into § 1127(b). This section does not take away the power of the district court to review attorneys' fees charged in a bankruptcy proceeding, nor does it take away the power to issue such orders as may be appropriate to carry out the provisions of the Bankruptcy Act. Under 11 U.S.C. § 105, a "court may issue any order, process, or judgment that is necessary or appropriate to carry out the

provisions of this title." A court also retains the post-confirmation power to issue an order necessary to the administration of the estate. *See* Federal Bankruptcy Rule 3020(d).

[12] The limitation of attorneys' fees from the pro rata distribution is not a modification of the bankruptcy Plan. There is no conflict between the limitation on fees and the Plan itself. The Plan need not be rewritten or modified because of the March 1 and May 2 orders, and nothing in the language of the CRF concerning costs, expenses and attorneys' fees can reasonably be construed as forbidding the district court from exercising its inherent power to prevent unreasonable fees. This language simply provides that claimants shall pay their own attorneys' fees, but does not, under any stretch of the imagination, say that their fees may be unreasonable or that the question of fees is not subject to judicial supervision.

[13] This section also states that the claimants shall bear their attorneys' fees "in connection with the claims resolution process, *except as provided otherwise by law.*" (emphasis added) This language subjects the matter of fees to the general law and the district court's powers in this field of law.

The March 1 and May 2 orders did not impermissibly modify the Plan but were entered in aid of the Plan and the CRF as provided by § 8.05(d) of the Plan itself.

D. *Evidentiary Basis for Factual Conclusions in the March 1, 1995 and the May 2, 1995 orders.*

[14] Appellants challenge the factual findings and conclusions of the district court in its two orders limiting attorneys fees to ten percent of the pro rata distribution. Under Federal Rule of Civil Procedure 52, factual findings of the court are reviewed for clear error. "[F]indings of fact will

be affirmed unless our review of the entire record leaves us with the definite and firm conviction that a mistake has been committed." *Hannan v. Levin*, 772 F.2d 1150, 1153 (4th Cir.1995).

[15] Appellants contend that the March 1 order had no evidentiary basis because no evidence had been presented on the issue of claimants' attorneys' fees at that time. This order contains statements that the court was aware of the degree of legal assistance required to receive compensation from the Trust, that the court assumed that attorneys' fees were mostly paid on a contingent basis, that no additional effort would be required of the claimants or their attorneys to receive the pro rata distribution, that the court had received numerous complaints from claimants about the level of attorneys' fees charged, and that fees in excess of ten percent would be considered unreasonable. In the May 2 order, the court reiterated factual findings of the March order and found that excess funds were available for pro rata distribution because of the unexpectedly large number of claimants settling under Option 1, because the assets of the Trust were wisely invested, and because the Trust had limited its operating and administrative expenses and had diligently monitored the claims resolution process.

The appellants also complain that the district court found that the initial recovery received by claimants represented full compensation for their injuries and that the pro rata distribution was a bonus. The appellants object to the court's finding that throughout the Robins bankruptcy, a relatively small number of lawyers have represented a very large number of claimants, and the lawyers have been handsomely paid considering the low risk levels involved and the routine for representing claimants under the CRF process.

The appellants-attorneys also assert that the large amount remaining in the Trust demonstrates that the Trustees were

overzealous in preserving the Trust assets by making low settlement offers to the claimants and that the funds now available should have already been distributed. The attorneys argued that they bargained for and expected to participate in a pro rata distribution. This is a rather unseemly argument coming from attorneys who previously contended that the $2.47 billion in the Trust was inadequate and should be raised to as much as $7 billion and that the possibility of a pro rata distribution was highly unlikely. *See In re A.H. Robins, Inc.*, 880 F.2d 694, 700 (4th Cir.1989) (in which we held that the district court's finding of $2.475 billion to cover the claims was not clearly erroneous).

The above challenged findings of fact are not clearly erroneous. This has been one of the most complex bankruptcy proceedings ever to come before a federal court and involves several hundred thousand claims from all over the world. The district judge and the bankruptcy judge have been sitting together in all matters arising under the Plan and the Trust and have been very diligent in their overall supervision of this case. They have expended great time and effort in trying to see that all valid claims are promptly paid. They have urged the attorneys into new areas and procedures in an effort to achieve the best results for those injured by the product. This has required the judges to be constantly aware of how successful the CRF has been in settling claims, how much money has been spent, how many claims remain, how the settlement options were working, whether the funds were going to be sufficient, what type of proof was being required to support the claims and thereby what type and degree of legal services were required from claimants' attorneys. Quarterly reports informed the court of the millions of dollars in fees being collected by attorneys without the risk usually accompanying products liability litigation. They also had the benefit of the testimony and exhibits presented by Professor Vairo. With this record and their ten years of constant contact with this

bankruptcy, they have made findings of fact in the March 1 and May 2 orders which we find not to be clearly erroneous.

E. *Fee Determination.*

[16] Appellants contend that the district court erred in the manner in which it reviewed their fees and its determination that any amount above ten percent of the pro rata distribution would be unreasonable. They assert that the district court did not conduct the reasonableness inquiry mandated by this court in *Barber v. Kimbrell's Inc., supra*, because it did not consider each of the twelve factors enumerated, it heard no evidence in its inquiry, it considered only the work that would be performed by the attorneys in connection with the pro rata distribution, rather than the totality of the work performed, it did not properly consider "the nature and length of the professional relationship between attorney and client" and the "attorneys' expectations at the outset of the litigation," it failed to consider the "total time and labor expended," and whether cases were settled under Options 2 and 3 or by arbitration or trial, and it did not consider whether the cases involved foreign or domestic claimants.

First, there is a serious question as to whether *Barber* applies to this inquiry into the reasonableness of a contingent fee. *Barber* is a fee shifting case, and in it we were concerned that the district courts consider the twelve factors before assessing an attorney's fee against a party, who had not employed said attorney and had lost the litigation because of said attorney's efforts. There we sought to protect a party from an unreasonable fee sought by an opposing counsel. In the present case, the district court sought to protect a party from an unreasonable fee sought by her own counsel.

This appeal is best considered under *Allen v. United States, supra*, because it deals with contingent fees and places upon

the district court the obligation to limit such fees to a reasonable amount.

Second, if *Barber* is applicable, the district court considered those factors of the litany that are applicable to the present fee determination, and the district court is under no obligation to go through the inquiry of those factors that do not fit. *See EEOC v. Service News Co.*, 898 F.2d 958, 965 (4th Cir.1990) ("From the record, factors (3), (4), (6), (7), (9), (10) and (12) do not seem to affect the fee in this case.")

Third, the appellants are not in a good position to complain about lack of evidence and the failure of the court to consider all of the time and effort they expended, because they introduced no evidence of what they had done that would justify the additional millions of dollars in fees they seek. They were given the opportunity to present evidence at the April 27 hearing, but they declined.

[17] "[W]e have recognized that because the district court has 'close and intimate knowledge of the efforts expended and the value of the services rendered, [the fee award] must not be overturned unless it is "clearly wrong."'" *Plyler v. Evatt*, 902 F.2d 273, 278 (4th Cir.1990).

In the present case, the district court had a much longer and more intimate knowledge of the efforts and value of attorneys' services than is usual because the court has been closely involved in this litigation and has supervised the administration of the CRF since its inception. The court heard the evidence presented to the effect that the vast majority of the claims were settled under one of the CRF options, the services of the attorneys were unusual in that few claims went to arbitration or trial. Most claims did not require the extensive preparation or the uncertainty of outcome that accompanies normal litigation and is used to justify contingent fees. The court was also aware that all of the claimants who would share in the pro rata distribution had already settled their claims and been paid.

The court could reasonably assume that the plaintiffs had already collected a one-third contingent fee from their clients' settlement and would collect a similar percent from the pro rata distribution. The plaintiffs put up no evidence to show a different fee arrangement although they had the burden of proof as to reasonableness.

Fourth, this litigation and appeal are wonderful examples of chutzpah. To merely examine the numbers would bring any reasonable person to the conclusion that based on the entire record, a ten percent attorneys' fee from the pro rata distribution is not only reasonable, but overly generous. The total fees already collected are staggering, but additional millions are to be received. Obviously, more than 10,000 claimants' attorneys thought the additional ten percent fee was reasonable, because they have not asked for reconsideration nor joined in the appeal.

To put the entire matter in perspective, we will examine what one of the plaintiff's attorneys has already received, what he will receive under the district court's order and what he seeks. We also will look at these amounts in the light of hourly charges for legal services. While we realize that hourly fees and contingent fees are different, the example below is helpful to put the numbers in perspective. Also, the fees at issue are no longer contingent on anything. They are certain.

This firm has received approximately $54,754,000 in settlements, and with the normal contingent fee of one-third would have produced over $18,000,000 in fees. The pro rata distribution is estimated to be in excess of 75 percent, and using this figure an additional $41,000,000 in settlements will come through this law office. Under the district court's order, these attorneys will collect an additional $4,100,000 in fees, but they are demanding $13,700,000 which would result in total fees to this office of over $30,000,000.

If the total fee ($22,000,000), fees already received plus the ten percent under the district court's order, is considered at an

hourly rate of $300 (a very high rate), it would require 70,000 hours of work to produce. An attorney would have to live as long as Methuselah to bill so many hours.

CONCLUSION

Appellants argue that in reviewing an attorney's fee for reasonableness, the court must consider the total work performed by the attorney together with the total fee received. We do not disagree with this proposition, but whether the attorneys' efforts in the present case are viewed as a whole or in segments, the attorneys have been handsomely compensated. They are fortunate that there was no cross-appeal asserting that the fee of ten per cent of the pro rata distribution was unreasonably high, when considered with the fees already received and the total services rendered and results obtained.

Appellants have the temerity to contend that they negotiated for and approved the Plan in reliance upon the potential of a pro rata distribution without any limitation on attorneys' fees, when the history of this litigation reflects that they argued from the creation of the Plan that the Trust was dreadfully under funded and would be insufficient to pay all claims. Plaintiffs are well aware that the surplus was not expected, and the provision of pro rata distribution was put into the Plan to prevent any surplus from being returned to the company. Without such provision, there would have been the constant claim that the CRF was being administered in an overly frugal way, and claimants were being short changed, so as to increase the surplus going back to the company.

When the district court realized that there would be a very sizable distribution and had received complaints from Dalkon Shield claimants about the unreasonably large attorneys' fees being collected, the court had the obligation to investigate. This investigation convinced the court that the fees exceeding

ten percent on the pro rata distribution would be unreasonable and this finding is not clearly erroneous. The court has the jurisdiction and authority to remedy the situation, and its remedy was reasonable, legal and within its discretion.

We have carefully considered the other exceptions raised by the appellants and find them to be without merit.

AFFIRMED.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

In Re:	)	
	)	
A. H. ROBINS COMPANY, INCORPORATED,	)	Chapter 11
	)	
Debtor.	)	Case No. 85-01307-R
	)	
Employer's Tax Identification No. 54-04863488	)	Retained Proceeding (Judge Merhige)

ORDER-DISALLOWING UNREASONABLE ATTORNEYS FEES ON PRO RATA DISTRIBUTION

In § 8.05 of the Sixth Amended and Restated Plan of Reorganization of the A. H. Robins Company ("Plan") and paragraph 45 of the July 26, 1988 Order confirming the Plan, this Court retained exclusive jurisdiction to resolve controversies and disputes regarding interpretation and implementation of the Plan and its related instruments, including the Claims Resolution Facility ("CRF"), and to enter orders in aid of the Plan, the Trust Agreements, and the CRF. Pursuant to that retained jurisdiction, through regular reporting by the Dalkon Shield Claimants Trust ("Trust"), the Court is familiar with the Trust's progress towards the full, fair, and expeditious resolution of Dalkon Shield Personal Injury Claims pursuant to the CRF. The Court is well aware of the nature of the claims resolution process, the degree to which legal assistance is required to become eligible for compensation from the Trust, the numbers of claims resolved and of claims remaining before the Trust, the payments made

by the Trust on claims to date, the administrative expenditures of the Trust, and the assets remaining in the Trust.

Under § G.14 of the CRF, if the Trust has funds remaining after it has paid meritorious timely-filed claims and Late Claims, such remaining funds shall be paid to claimants (other than holders of Dalkon Shield Liquidated Claims) who received compensatory damage awards from the Trust, on a pro rata basis consistent with such awards. Section G.14 also allows the Trustees, in their discretion, to set a de minimis amount below which such payments need not be made.

On the basis of the information available to the Court in the exercise of its retained jurisdiction, the Court has determined that it is likely that the Trust will have funds remaining after payment of timely-filed and Late Claims that will be distributed on a pro rata basis according to the terms of § G.14. By the time any such pro rata distribution is made by the Trust, all claimants receiving any such distribution will have been paid in full on their Dalkon Shield Claims by the Trust according to the terms of the Plan and the CRF.

The attorneys representing such claimants by that time also will have received payment of their expenses and their attorneys fees, which the Court assumes were almost universally paid on a contingency fee basis, calculated upon these full compensatory awards. No additional effort will be required of the claimants or their counsel to receive the pro rata distribution. Over the years of the Trust's existence, the Court has also received numerous complaints from Claimants and others regarding the level of fees charged to Claimants, but has avoided becoming entangled in such disputes.

In light of the foregoing, the Court has reviewed the issue of whether it would be reasonable for the attorneys representing Dalkon Shield Claimants to charge and receive additional attorneys fees out of the pro rata distribution. On the basis of this analysis, in the exercise of this Court's retained jurisdiction, it is **ORDERED** and **ADJUDGED** as follows:

1. The Court's Authority to Regulate Fees. The Court's authority to supervise members of the bar, its inherent powers to regulate attorney-client relations and compliance with ethical standards by attorneys, the equitable powers of the Court under 11 U.S.C. § 105(a) and the inherent equitable powers of the Court, render the contingency fee contracts of attorneys representing Dalkon Shield Claimants subject to the supervision of this Court to ensure that excessive or unreasonable fees are not charged or recovered by counsel.

2. Disallowance of Unreasonable Attorneys Fees Out of the Pro Rata Distribution. The court has determined, based upon the foregoing, that attorneys fees charged by counsel to Dalkon Shield Claimants out of any pro rata distribution by the Trust under § G.14 of the CRF in excess of ten percent of the pro rata distribution would be unreasonable and thus are hereby disallowed. Unless reinstated under the terms of this order, counsel for Dalkon Shield Personal Injury Claimants are prohibited from charging or receiving, directly or indirectly, any compensation or fees, based upon or out of any pro rata distribution received by a Dalkon Shield Personal Injury Claimant from the Trust under § G.14 of the CRF, in excess of ten percent of such pro rata distribution by the Trust to the Claimant (with such disallowed fees referred to hereafter in this Order as "Disallowed Fees").

3. Objections to Disallowance. Any attorney representing a Dalkon Shield Personal Injury Claimant who objects to this disallowance and wishes to seek reinstatement of his or her claim to Disallowed Fees must follow all of the procedures set out in the remainder of this Order. Failure to follow any one of the steps prescribed in this order for seeking reinstatement shall constitute a waiver of any request for reinstatement.

4. Filing and Service of Materials. All pleadings and other papers filed with this Court by or on behalf of any attorney in response to this order must be mailed or otherwise sent so that they are received, regardless of postmark, by the date required, at the following address:

Mailing Address:	Delivery Address:
Office of the Clerk United States Bankruptcy Court Post Office Box 676 Richmond, Virginia 23206-0676	Office of the Clerk United States Bankruptcy Court 1100 E. Main Street, Room 301 Richmond, Virginia 23219

One copy of all such pleadings or other papers must at the same time be served upon the Trust by mailing or delivery to the following:

Mailing Address:	Delivery Address:
Orran Lee Brown Counsel to Dalkon Shield Claimants Trust Post Office Box 1314 Richmond, Virginia 23210	Orran Lee Brown Counsel to Dalkon Shield Claimants Trust 107 S. Fifth Street Richmond, Virginia 23219

5. Motions for Reinstatement. Any attorney for a Dalkon Shield Personal Injury Claimant who wishes to seek reinstatement of his or her claim for recovery of attorneys fees out of any pro rata distribution under § G.14 of the CRF must, on or before April 17, 1995, file with this Court and serve on the Trust a written Motion for Reinstatement, stating the request that his or her claim for attorneys fees be reinstated and setting out the facts and legal arguments that the attorney

believes would justify reinstatement of the attorneys fees claim.

6. April 27, 1995 Hearing. A hearing will be held before this Court beginning at 8:30 a.m. Eastern Standard Time on April 27, 1995, in the United States Courthouse, Third Floor, 10th and Main Streets, Richmond, Virginia 23219 on all Motions for Reinstatement filed in response to this Order. Any attorney wishing to be heard on a Motion for Reinstatement may appear at such time, subject to the terms of this order.

7. Material that Must Be Filed By Movants Before the April 27, 1995 Hearing. On or before April 17, 1995, any attorney filing a Motion for Reinstatement must file along with that Motion and serve upon the Trust:

(1) a statement of whether the movant will appear at the April 27, 1995 hearing, and, if not, identifying any person who will appear on behalf of the movant;

(2) a list of any exhibits offered by or on behalf of the movant in support of the movant's Motion for Reinstatement for the Court's consideration at the April 27, 1995 hearing;

(3) a copy of each exhibit on the list of exhibits required in (2); and

(4) a list of all persons who may testify in support of the Motion for Reinstatement at the April 27, 1995 hearing and a summary of the expected content of their testimony.

Failure to conform to the requirements of this paragraph will, except for good cause shown, prevent the offering and admission of any exhibit or testimony of any person not so designated.

8. Material to be Filed by the Trust. On or before April 20, 1995, the Trust is invited to file and serve on all Movants a statement of its position on the disallowance of the Disallowed Fees effected by this order.

9. Notice of Disallowance and of the Hearing. The Trust is directed to serve a copy of this Order upon all attorneys representing Dalkon Shield Personal Injury Claimants at the last addresses provided by such attorneys to the Trust. Such service shall be made by first-class mail and shall constitute sufficient notice of the disallowance of the attorneys fees pursuant to this order, the procedure for seeking reinstatement of Disallowed Fees, and of the April 27, 1995 hearing.

10. Notice to Individual Claimants. Each attorney is mandatorily enjoined to mail, within ten business days of the attorney's receipt of this Order, a copy of this order by first class mail to each Dalkon Shield Personal Injury Claimant represented by the attorney.

s/ Robert R. Merhige, Jr.
United States District Judge

Date: March 1, 1995

NOTICE OF JUDGMENT OR ORDER
Entered on Docket MAR - 1 1995

In re A.H. ROBINS COMPANY, INCORPORATED, Debtor, Employer's Tax Identification No. 54-0486348.

Bankruptcy No. 85-01307-R.

United States Bankruptcy Court,
E.D. Virginia,
Richmond Division.

May 2, 1995.

Attorneys for claimants in Chapter 11 case filed motions to reinstate attorney fees disallowed as unreasonable on pro rata distribution from Dalkon Shield Claimants Trust. The Bankruptcy Court held that: (1) limitation on attorney fees payable by claimants out of pro rata distribution of trust assets involved issue of interpretation or implementation of Chapter 11 plan and were within bankruptcy court's statutory and retained jurisdiction; (2) case and controversy requirement of Article III was satisfied; (3) issue was ripe for review; and (4) any attorney fee exceeding 10% of pro rata distribution from trust assets was per se unreasonable, shocked conscience of court, and would be disallowed.

Affirmed.

1. Bankruptcy 2043(1)

Proceeding "arises in" Chapter 11 case when it is not based on any right expressly created by Title 11 but would have no practical existence but for bankruptcy. 28 U.S.C.A. § 1334(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy 2043(3)

Matter may "relate to" Chapter 11 case, even where debtor or its representative is not party. 28 U.S.C.A. § 1334(b).

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy 3570

Bankruptcy court could interpret federal bankruptcy jurisdiction statute liberally, especially where question at hand involved interpretation or implementation of sixth amended and restated plan of reorganization of Chapter 11 debtor. 28 U.S.C.A. § 1334(b).

4. Bankruptcy 3570

Under Bankruptcy Code provision defining bankruptcy court's postconfirmation authority, court may address any matters concerning implementation or execution of confirmed plan. Bankr.Code, 11 U.S.C.A. § 1142(b).

5. Bankruptcy 3570

Where there exists matter involving interpretation or implementation of confirmed plan or any related documents under which plan was managed, i.e., matter "arising in" or "related to" debtor's Chapter 11 case, bankruptcy court is fully and exclusively empowered to address that matter in first instance. Bankr.Code, 11 U.S.C.A. § 1142(b); 28 U.S.C.A. § 1334(b).

6. Bankruptcy 3570

Limitation on attorneys' fees payable by claimants out of pro rata distributions of assets of Dalkon Shield Claimants Trust involved issue of interpretation or implementation of conformed Chapter 11 plan within bankruptcy court's statutory and retained jurisdiction; clearly, but for Chapter 11

case, issue would have no practical existence. Bankr.Code, 11 U.S.C.A. § 1142(b); 28 U.S.C.A. § 1334(b).

7. Bankruptcy 2125

Exercise of equitable power by bankruptcy court under provision of Bankruptcy Code authorizing court to issue any order necessary or appropriate to carry out Title 11, while broad, is not limitless; in other words, exercise of equitable powers must be strictly confined within parameters established by language and intent of Bankruptcy Code. Bankr.Code, 11 U.S.C.A. § 105.

8. Bankruptcy 2126

Provision of Bankruptcy Code authorizing court to issue any order necessary or appropriate to carry out provisions of Title 11 was additional basis for bankruptcy court's jurisdiction to limit attorney fees payable by claimants out of pro rata distributions from Dalkon Shield Claimants Trust assets. Bankr.Code, 11 U.S.C.A. § 105.

9. Bankruptcy 3570

Bankruptcy court order limiting attorney fees paid by claimants out of pro rata distributions by Dalkon Shield Claimants Trust and related hearing plainly arose in and/or was related to pending Chapter 11 bankruptcy of manufacturer, and thus, case and controversy requirement of Article III was satisfied with respect to issue of limitation of attorney fees. U.S.C.A. Const. Art. 3, § 1 et seq.

10. Bankruptcy 3204, 3570

Bankruptcy court had power, sua sponte, to review legal fees to be awarded to attorneys for claimants from pro rata distributions to claimants of assets of Dalkon Shield Claimants Trust.

11. Bankruptcy 3570

Issue of bankruptcy court's limitation of attorney fees payable from pro rata distributions to claimants from assets of Dalkon Shield Claimants Trust was ripe for review where any delay in considering challenges to court's review of legal fees would only work to detriment of claimants by delaying claimants' receipt of their pro rata share.

12. Bankruptcy 3570
Constitutional Law 306(4)

Review of attorney fees payable from pro rata shares awarded to claimants from Dalkon Shield Claimants Trust was not premature and did not violate attorney's Fifth Amendment rights; although it might be true that it was too early to determine what services would be required to obtain initial recovery from trust with respect to any unresolved claims, it was equally true that calculation and distribution of pro rata share would not flow directly from efforts of counsel and would not require any additional legal efforts on part of counsel, and hearing related to bankruptcy court's order afforded all attorneys opportunity to be heard. U.S.C.A. Const.Amend. 5.

13. Attorney and Client 146.1, 148(1)

Attorney contingency fee contracts are subject to inherent powers of court and cannot be construed in same fashion as ordinary commercial contracts.

14. Attorney and Client 146.1

It is within inherent equitable powers of federal court to review reasonableness of attorney fees under contingency fee contracts.

15. Attorney and Client 147

Although contingency fee may have been reasonable when contract was signed, intervening circumstances can render contract unfair in its enforcement.

16. Attorney and Client 147

Fact that client is willing to abide by attorney fee agreement is not dispositive of whether contingency fee agreement is reasonable.

17. Bankruptcy 3570

Language in Dalkon Shield claims resolution facility stating that pro rata distribution will be paid to claimants in lieu of punitive damages in no way precluded review by federal court of reasonableness of attorney fees payable from pro rata distributions.

18. Bankruptcy 2124.1, 3192

Absent showing of exceptional circumstances, any attorney fee exceeding 10% of pro rata distributions made to claimants from Dalkon Shield Claimants Trust was per se unreasonable, shocked conscience of court, and would be disallowed pursuant to court's inherent powers to supervise bar. U.S.Dist. Ct.Rules E.D.Va., Rule 7(I); U.S.Bankr.Ct. Rules E.D.Va., Rule 105(I); Va.Code of Prof. Resp., DR 2-105(A).

19. Bankruptcy 2125, 3192

Absent showing of exceptional circumstances, any attorney fee exceeding 10% of pro rata distributions made to claimants from assets of Dalkon Shield Claimants Trust was per se unreasonable, shocked conscience of court, and would be disallowed pursuant to court's inherent equitable powers.

20. Bankruptcy 3195, 3199

Under reasonable inquiry mandated by Fourth Circuit's Barber decision, attorney fees in excess of 10% of pro rata distributions to claimants from Dalkon Shield Claimants Trust were unreasonable, where attorney efforts expended on pro rata distribution would be absolutely minimal, there would be no legal questions involved in forwarding payments to claimants, there was no opportunity costs in assuming ministerial tasks associated with distribution, and no attorney could legitimately claim that he expected, from outset of litigation, to receive compensation through pro rata payments to claimants.

21. Attorney and Client 140

Factors to be considered by district court to determine reasonableness of attorney fees include: time and labor expended; novelty and difficulty of questions raised; skill required to properly perform legal services rendered; attorney's opportunity costs in pressing instant litigation; customary fee for like work; attorney's expectations at outset of litigation; time limitations imposed by client or circumstances; amount in controversy and results obtained; experience, reputation and ability of attorney; undesirability of case within legal community in which suit arose; nature and length of professional relationship between attorney and client; and attorney fees awarded in similar cases.

22. Attorney and Client 140

"Legal fee" can either refer to hourly dollar rate, flat dollar rate, or contingency percentage; thus, court is free to examine reasonableness of percentage as well as absolute dollar amount of fees in determining reasonable attorney fee award.

Benjamin C. Ackerly, Lewis T. Booker, Tyler P. Brown, Hunton & Williams, Richmond, VA, for movant.

Orran Lee Brown, Richmond, VA, for Dalkon Shield Claimants Trust.

Before MERHIGE, District Judge, and BLACKWELL N. SHELLEY, Bankruptcy Judge.

MEMORANDUM

This matter is before the Court on over seventy motions to reinstate attorneys' fees, filed pursuant to this Court's Order disallowing unreasonable attorneys' fees, dated March 1, 1995. The Dalkon Shield Claimants Trust ("Trust") appears in its role as fiduciary for all Dalkon Shield claimants.

I.

On March 1, 1995, this Court issued an Order Disallowing Unreasonable Attorneys Fees On Pro Rata Distribution. This Order was premised upon several factual findings: the likelihood of a substantial pro rata distribution to Dalkon Shield Claimants once all timely and valid late claims are paid in full, the facts that no legal effort will be required to secure such a payment and that counsel will be fully compensated through contingency fee contracts for their efforts in securing the underlying recovery,[1] and the fact that this Court has received numerous complaints regarding attorneys' fees. Since the issuance of that Order, the pro rata distribution is no longer a likelihood, but is instead a near certainty. According to conservative estimates by the Trust, the pro rata distribution could approximate 75% of each claimant's initial

[1] The evidence before the Court reveals that these contingent fee arrangements called for fees between one-quarter and one-half of a claimant's recovery, with most charging one-third.

recovery. Pursuant to § G.14, the Trustees have determined that there will be no pro rata distribution to claimants whose initial recoveries did not exceed the *de minimis* amount of $725.00.

Four primary factors have combined to permit this bonus distribution. To begin, an unexpectedly large number of claimants have settled their claims under Option 1 of the CRF, which provides a recovery of $725.00 upon a "minimal showing of Dalkon Shield use and injury." CRF § C. Second, the Trust assets have been wisely invested, earning interest income of approximately $830,000,000 over the life of the Trust. Third, the Trust itself has prudently limited its operating expenses, thus leaving an additional amount of approximately $200,000,000 for distribution to claimants. Finally, the Trust has diligently monitored the claims resolution process to ensure full compliance with the goals of the Plan and the related documents under which the case is being managed. Contrary to Movants' assertions, the pool of funds available for the pro rata distribution was neither created nor enhanced through the efforts of counsel.

Many of these factors were unforeseen at the commencement of the Robins bankruptcy. In fact, the Trustees initially were so concerned about the Trust's ability to satisfy all timely claims that they implemented a holdback, pursuant to which any amounts recovered in excess of the Option 3 settlement offer or a set dollar figure, whichever was greater, was withheld from the claimant. The Trustees also agreed to "hold back" their salaries given their concerns. It was not until February, 1995, that the Trustees became convinced that all claims, timely and late, will be paid in full and that a pro rata distribution would be paid.

It was on this basis, as well as the other factual findings recited in the March 1, 1995 Order, that the Court ordered

> that attorneys fees charged by counsel to Dalkon Shield Claimants out of any pro rata distribution by the Trust

under § G.14 of the [Claims Resolution Facility ("CRF")] in excess of ten percent of the pro rata distribution would be unreasonable and thus are hereby disallowed. Unless reinstated under the terms of this Order, counsel for Dalkon Shield Personal Injury Claimants are prohibited from charging or receiving, directly or indirectly, any compensation or fees, based upon or out of any pro rata distribution received by a Dalkon Shield Personal Injury Claimant from the Trust under § G.14 of the CRF, in excess of ten percent of such pro rata distribution by the Trust to the Claimant.

Order, Docket No. 21865 (March 1, 1995). The Order further instructed any attorney intending to seek reinstatement of his fee to comply with various procedural prerequisites, including the filing of a motion for reinstatement no later than April 17, 1995. The Order also established a hearing date of April 27, 1995, whereby Movants were invited to present their case for reinstatement to this Court. The Trust mailed the Order to over 10,000 attorneys. To date, seventy-six (76) attorneys have filed reinstatement motions, approximately thirty of whom have indicated that they would be present at the hearing.

The brief submitted on behalf of thirty of the movants by local counsel largely summarizes the legal position of all Movants. Movants begin with the premise that this Court lacked the jurisdiction to enter an Order disallowing attorneys' fees. They further argue that the Court, through its Order, improperly attempted to modify the plan and, alternatively, to amend the trust agreement. Turning to the substance of the Order, they contend that this Court lacks the inherent power to regulate attorneys' fees and that, in any event, their fees are reasonable. Finally, Movants argue that there is no justiciable case or controversy in that (1) no claimant has complained to

the Court about attorneys' fees[2] and (2) the matter is not ripe for adjudication. In connection with this case or controversy argument, Movants propose that the alleged prematurity of the Court's Order deprives the Movants of due process.

II.

A. Statutory and Plan Jurisdiction

The jurisdiction of a federal court sitting in bankruptcy is prescribed by statute:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b). Thus, the events comprising the fee disallowance, including the March 1, 1995 Order, the seventy-five Motions for Reinstatement and the April 27, 1995 hearing, must either "arise in" or be "related to" the A.H. Robins Chapter 11 bankruptcy in order to fall within this Court's statutory jurisdiction.

[1-3] A proceeding "arises in" a Chapter 11 case when it is "not based on any right expressly created by Title 11 but would have no practical existence but for the bankruptcy." *Lux v. Spotswood Constr. Loans*, 176 B.R. 416, 418 (E.D.Va.) (Merhige, J.) *(citing In Matter of Wood*, 825 F.2d 90, 97 (5th

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[2] A factual contention without basis according to the records of the Trust and hence this Court. Specifically, this Court has considered various requests by attorneys to place a lien on the Trust because their clients are contesting their fee and refusing payment. Moreover, this Court has received a large volume of claimant correspondence in which claimants complain about fees charged.

Cir.1987)), *aff'd*, 43 F.3d 1467 (4th Cir.1994). The United States Court of Appeals for the Fourth Circuit has broadly interpreted the "related to" language of § 1334(b):

> An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 1002 n. 11 (4th Cir.) *(quoting Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir.1984), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986)); *see In re Johnson*, 960 F.2d 396, 403 (4th Cir.1992) ("Courts have adopted an expansive definition of what is a related proceeding.").[3] In further recognition of § 1334(b)'s breadth, the Fourth Circuit agreed that there may be "controversies over which the new bankruptcy courts . . . would have jurisdiction even if neither the debtor nor a representative of the estate were a party." *Id.* (citation omitted). On this authority, it is clear that this Court may interpret § 1334(b) liberally, especially where the question at hand involves interpretation or implementation of the Sixth Amended and Restated Plan of Reorganization of the A.H. Robins Company ("Plan").

[4] Upon confirmation of the Plan, this Court retained jurisdiction in accordance with the terms of the Plan, the other provisions of this Order, and Section 1142 of the Bankruptcy Code. *See In re A.H. Robins Co., Inc.*, 88 B.R. 742

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[3] Movants emphasize that this definition only specifies the *debtor*. This position, however, wholly ignores the second considertion–whether the handling and administration of the estate is affected by the matter. Moreover, Movants disregard the Fourth Circuit's acknowledgement *infra*, that a matter may relate to a Chapter 11 case even where the debtor or its representative is not a party.

(Bankr.E.D.Va.) (confirmation order), *aff'd*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959, 110 S.Ct. 376, 107 L.Ed.2d 362 (1989). Pursuant to § 1142,

> [t]he court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act . . . that is necessary for the confirmation of the plan.

11 U.S.C. § 1142(b). This section defines the court's post-confirmation authority; specifically, the Court may address any matters "concerning the implementation or execution of a confirmed plan." *Goodman v. Phillip R. Curtis Enters., Inc.*, 809 F 2d 228, 232 (4th Cir.1987).

[5] In recognition of this statutory authority, this Court possesses the exclusive retained jurisdiction "to resolve controversies and disputes regarding interpretation and implementation of the Plan, the Trust Agreements [and] the Claims Resolution Facility ['CRF']," and "to enter orders in aid of the Plan, the Trust Agreements, [and] the [CRF]." Sixth Amended and Restated Plan of Reorganization of the A.H. Robins Company ("Plan") §§ 8.05(c) & (d). The breadth and exclusivity of this jurisdiction has been acknowledged by the Fourth Circuit on several occasions. *Anderson v. Dalkon Shield Claimants Trust* 42 F.3d 870, 871 (4th Cir.1994); *Dalkon Shield Claimants Trust v. Reiser*, 972 F.2d 77, 79 n. 1 (4th Cir.1992). In fact, that court has specifically declined to define more narrowly this Court's § 8.05 retained jurisdiction owing to the "unique" general nature of the Robins case. *Official Dalkon Shield Claimants Committee v. Mabey*, 880 F.2d 769, 775-76 (4th Cir.1989). Consequently, where there exists a matter involving the interpretation or implementation of the Plan or any related documents under which the Plan is managed (i.e., a matter "arising in" or "related to" the A.H.

Robins Chapter 11 case), this Court is fully and exclusively empowered to address that matter in the first instance.

B. Jurisdiction to review attorneys' fees

[6] The question as to statutory and Plan authority thus becomes whether or not the limitation of attorneys' fees, payable by claimants out of a pro rata distribution of Trust assets, involves an issue of interpretation or implementation falling within this Court's statutory and retained jurisdiction. The Court answers this question in the affirmative.

The Trust's overriding purpose is to satisfy all Dalkon Shield claims as "fully, fairly and expeditiously as practicable." Claimants Trust Agreement ("CTR") § 2.02. Consequently, the CRF is fashioned

> to provide all persons full payment of valid claims at the earliest possible time consistent with the efficient design and implementation of the claims resolution facility . . . by (1) providing an efficient economical mechanism for liquidating claims which favors settlement over arbitration and litigation, *thereby reducing transaction costs.*

CRF § A (emphasis added). Thus, CRF § A dictates that the alleviation of direct transaction costs to each individual claimant is a necessary and critical prerequisite to fully, fairly and expeditiously compensating Dalkon Shield claimants for their injuries. At issue before the Court, therefore, is the relationship between this mandate and the § G.14 pro rata distribution. Clearly, but for the Chapter 11 case, this question "would have no practical existence." *Lux*, 176 B.R. at 418.

Movants essentially assert that no such relationship exists, interpreting CRF § A as calling for the limitation of Trust administrative expenses, not claimant counsel fees. This Court interprets § A differently. Despite Movant's assertions to the contrary, attorneys' fees were certainly among the transaction

costs contemplated in CRF § A. Indeed, the primary economic benefit redounding to the advantage of claimants in favoring settlement over arbitration or litigation is a tremendous savings in legal fees and costs. Quite simply, as borne out in the Trusts' records, the Plan's ultimate goal is to ensure that as much money as possible ends up in the pockets of the claimants, and a settlement offer from the Trust, which inherently requires substantially less legal effort, is one method of attaining that result.

To achieve claimant cost minimization and return maximization, this policy must apply to the entire claims resolution process. Specifically, the minimization of transaction costs not only applies to the claims resolution process and the settlement versus ADR/arbitration/litigation decision, but must also continue through the Trust's winding down process including the CRF § G.14 pro rata distribution. Only then can the claimants be assured of receiving the fullest form of compensation possible.

[7, 8] In issuing the Order of March 1, 1995, this Court consequently and properly assumed the responsibility of ensuring that transaction costs associated with the § G.14 pro rata distribution are properly minimized within the meaning of CRF § A.[4] This Court *must* shoulder this obligation; otherwise, the claimants' interest in minimizing transaction costs related to the pro rata distribution would remain unprotected as no other competent forum exists to conduct such a review. This is especially true as regards the overwhelming majority of claimants who have settled, or will settle, their claims. On this basis, the Court concludes that the Order of March 1, 1995, and any subsequent review of the

[4] Given that the March 1, 1995 Order represents an interpretation and implementation of the Plan, any assertion that the Court was attempting to modify the Plan or amend the Trust is wholly unfounded.

reasonableness of attorneys' fees, arise in and relate to the A.H. Robins bankruptcy and come within the Court's exclusive retained jurisdiction as set forth in CRF § 8.05.[5]

[9] Movants contend that an Article III case or controversy does not exist because of their mistaken belief that no party has contested attorneys' fees. They also argue that the matter

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[5] The Court also relies upon § 105 of the Bankruptcy Code. This provision sets forth the equitable powers of a court sitting in bankruptcy, providing, in part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105. The exercise of equitable power under § 105, while broad, is not limitless. Specifically, while § 105 may "encourage courts to be innovative, and even original, these equitable powers are not a license for a court to disregard the clear language and meaning of the bankruptcy statutes and rules." *Official Comm. of Equity Sec. Holders v. Mabey, 832* F.2d 299, 302 (4th Cir.), *cert. denied,* 485 U.S. 962, 108 S.Ct. 1228, 99 L.Ed.2d 428 (1988). In other words, the exercise of equitable powers under § 105 must be "strictly confined" within the parameters established by the language and intent of the Bankruptcy Code. *Id. (quoting Guerin v. Weil, Gotshal & Manges,* 205 F.2d 302, 304 (2d Cir. 1953)); *see also Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206, 108 S.Ct. 963, 968-69, 99 L.Ed.2d 169 (1988) (equitable powers limited to confines of Code).

The Bankruptcy Code does not prohibit courts from examining the reasonableness of attorneys' fees. In fact, the Code contains various provisions in different contexts indicating that the court is responsible for monitoring the reasonableness of attorneys' fees in a bankruptcy case. *See e.g.,* 11 U.S.C. § 330(a)(1)(A) ("reasonable compensation" may be paid to professionals); *Id.* § 502(b)(4) (claims for legal services will be allowed as long as the value of the claim does not exceed the "reasonable value" of the services rendered); *Id.* § 503(b)(4) (attorneys' fees will be allowed as administrative expenses as long as they may be considered "reasonable compensation" in considering "the time, the nature, [and] the extent" of such services). Because this Court's scrutiny of attorneys' fees in no way contradicts the language of the Code and is in accord with the Code's general policy of ensuring the reasonableness of legal fees in bankruptcy cases, the Court consequently draws upon § 105 as an additional source of authority in this matter.

is not ripe because the payment of the pro rata is only a possibility, not a present controversy.

[10] Movants' argument ignores the unequivocal fact that the A.H. Robins bankruptcy is far from over. Indeed, the Court is presently responsible for supervising the management of over $1.4 billion in assets remaining in the Trust, and contested matters arise on a regular basis. As indicated heretofore, the March 1, 1995 order and the related hearing plainly arise in (and/or relate to) this pending bankruptcy and, as such, satisfy the case or controversy requirement of Article III. Moreover, the Court is satisfied that it has the power to review legal fees in this matter *sua sponte*. *E.g., Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1111 (7th Cir.1982) (citations omitted). Thus, it is irrelevant that a party has not raised a contest regarding legal fees.[6]

[11] As regards ripeness, the payment of the pro rata distribution is not a question of "if," but only one of "how much." Thus, any legal challenges to the Court's review of attorneys' fees on the distribution cannot, in essence, become any more ripe for judicial consideration. More importantly, any delay in considering challenges to the Court's review of legal fees will only work to the detriment of the claimants. Specifically, if the motions now before the Court are not considered until the distribution is actually ready to be paid, the claimants' receipt of their proportionate share will be interminably delayed as only then will the legal challenges begin to stir, the hearings he held and the appeals be noted. Such delay and detriment to the claimants runs contrary to their right to the expeditious resolution of their claims. *See* CTR § 2.02; CRF § A. Accordingly, the Court concludes that

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[6] Section 105 of the Bankruptcy Code likewise permits a court to exercise its equitable powers *sua sponte*. 11 U.S.C. § 105(a).

the issues are fit for "judicial decision" and that "hardship" to the claimants will be avoided if the Court considers the reasonableness of fees at this time. *See Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515-16, 18 L.Ed.2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

[12,13] In a ripeness-related argument, Movants allege that a review of attorneys' fees at this time is premature and in violation of their Fifth Amendment rights. This argument can be readily dismissed on the principle that attorney contingency fee contracts are subject to the inherent powers of the court and cannot be construed in the same fashion as ordinary commercial contracts. *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1108 (3d Cir.1979); *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958, 234 S.E.2d 282, 285 (1977); *see also infra*. Moreover, Movants' argument is premised on an unconvincing attempt to package together two distinct issues–the reasonableness of fees charged against a claimant's *underlying recovery* from the Trust and the reasonableness of fees charged against a claimant's *pro rata payment*.

In reviewing the reasonableness of fees, there is a critical distinction between a claimant's underlying recovery on a Dalkon Shield claim and her subsequent receipt of a pro rata payment. The Plan, the Trusts and the CRF have been effectively and uniquely combined to compensate (to date) nearly two hundred thousand claimants out of a $2.4 billion trust. *See Mabey*, 880 F.2d at 775-76. The Trust has just recently determined that a substantial sum of money will be left over for a pro rata distribution in accordance with CRF § G.14. This payment will not be distributed, however, until all Dalkon Shield Claims are paid and all claimants are, thus, *fully compensated* for their injuries.

There can be little doubt that an underlying recovery equates to full compensation. A claimant's acceptance of a settlement essentially translates into a conclusion that the offer amount fairly represents full compensation for the injury sustained.[7] Likewise, any jury or arbitration award reflects a third party's belief that the claimant has been fully compensated for her injuries. Once an offer has been accepted or a jury or arbitrator has rendered an award, any efforts requiring specialized legal training, knowledge or skills will have been long completed and a lawyer unquestionably will be entitled to his contractual fee for his efforts in securing the underlying recovery.[8] The calculation and distribution of the pro rata, on the other hand, will not flow directly from the efforts of counsel, as Movants suggest. Rather, the distribution will result from the fortuitous merging of the factors discussed in Part I of this memorandum, and will not require *any* additional legal efforts on the part of counsel.

Thus, while it may be true that it is too early to determine what services will be required to obtain an initial recovery from the Trust with respect to any unresolved claims, it is

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[7] Indeed, claimants who accept their settlement offer (as well those who elect Alternate Dispute Resolution ["ADR"]) sign a release in which they acknowledge that the settlement amount (or any subsequent ADR award) represents full compensation for their injuries.

[8] Essentially, an attorney will be compensated for gathering medical records, reviewing them and, based on his review, advising the client as to the appropriate course of action. Once an attorney represents one claimant and, in that process, generally learns the "medicine" involved in a Dalkon Shield case, subsequent representations are largely mechanical and ministerial. This is especially true in light of the Trust's stringent no negotiation policy that endures during the *entire* claims resolution process. The primary exception to this general principle is the relatively small group of claimants who elect to proceed to arbitration or litigation. Nevertheless, the undisputable fact remains that the claims resolution process was designed to render legal assistance unnecessary throughout the settlement phase of the claims resolution process.

equally true that the April 27, 1995, hearing afforded all Movants with the opportunity to proffer sufficient evidence of whatever minimal work will be required of attorneys to ensure that their clients receive their pro rata payment. Consequently, Movants had a full opportunity to argue and present evidence in support of their motions.

IV.

[14-16] "[I]t is within the court's inherent power of supervision over the bar to examine the attorney's fee for conformance with the reasonable standard of the Code of Ethics." *Rosquist*, 692 F.2d at 1111; *accord Allen v. United States*, 606 F.2d 432 (4th Cir.1979); *In re Michaelson*, 511 F.2d 882, 888 (9th Cir.1979); *Schlesinger v. Teitlebaum*, 475 F.2d 137, 141 (3d Cir.), *cert. denied*, 414 U.S. 1111, 94 S.Ct. 840, 38 L.Ed.2d 738 (1973); *Farmington Dowel Prod. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 90-91 (1st Cir.1970); *Cappel v. Adams*, 434 F.2d 1278, 1280 (5th Cir.1970). It is also within the inherent equitable powers of a federal court to review the reasonableness of attorneys' fees under contingent fee contracts. *E.g., Krause v. Rhodes*, 640 F.2d 214, 218 (6th Cir.), *cert. denied*, 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed.2d 117 (1981). While a contingency fee may have been reasonable when the contract was signed, intervening circumstances can render a reasonable contract "unfair in its enforcement." *Id.* at 220; accord *McKenzie Constr. Co. v. Maynard*, 758 F.2d 97, 101 (3d Cir.1985). Moreover, the fact that a client is willing to abide by the fee agreement is not dispositive "for the object of the court's concern is not only a particular party but the conformance of the legal profession to

its own high standards of fairness." *Rosquist*, 692 F.2d at 1111 (*quoting Farmington*, 421 F.2d at 90 n. 62).[9]

[17] The language in CRF § G.14, stating that the pro rata distribution will be paid "in lieu of punitive damages," in no way precludes a review of the reasonableness of attorneys' fees. Even if the Court accepts Movants' argument that the pro rata distribution and the underlying recovery should be considered as a package recovery, which it does not, this Court undoubtedly possesses the power to review fees purportedly charged upon such a package. Thus, this language of § G.14 has no relevance as regards this Court's power to review attorneys' fees.

A. Inherent power to supervise the bar

[18] In overseeing members of the bar, this Court must seek guidance from the Virginia Rules of Professional Responsibility. E.D.Va.R. 7(I) & E.D.Va.Bankr.R. 105(I). Disciplinary Rule 2-105(A) requires that a lawyer's fee be "reasonable." The Standing Committee on Legal Ethics of the Virginia State Bar interpreted this section in the context of contingency fee agreements in Legal Ethics Opinion 1461. In

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[9] Movants, citing *Dunn v. H.K. Porter Co., Inc*, 602 F.2d 1105, 1111-12 (3d Cir.1979), argue that pre-petition fee contracts are presumptively reasonable and that post-petition contracts, at the least, warrant a full hearing. Given the extraordinary circumstances surrounding the instant matter as well as the entire Robins bankruptcy, the Court is not persuaded that pre-petition contracts should be considered any differently than those entered into post-petition during the Court's inherent power inquiry. Nor should a distinction be drawn while assessing the *overall* reasonableness of fees charged on the pro rata distribution. The Court, however, has *not* foreclosed the opportunity for Movants to suggest in their *individual* cases that such a distinction should be made.

particular, the committee addressed a situation in which a minor child, injured by an automobile, was represented by an attorney under a contingency fee agreement calling for the payment of "one-third of all money recovered." Va. Standing Comm. Legal Ethics, Legal Ethics Op. 1461 (1992). A personal injury suit was filed on the child's behalf against the driver. In the meantime, the child's parents' insurance company agreed to pay for all medical expenses. The attorney consequently sent the bills to the carrier who provided medical compensation payments in accordance with the policy.

On these facts, the committee addressed the following inquiry: "whether . . . it is proper for the attorney to receive his one-third contingent fee out of this medical compensation payment." *Id.* After characterizing the efforts to secure these medical payments as "merely ministerial in nature" and acknowledging that a contingent fee may be appropriate if recovery of the payments required "specialized legal knowledge or experience," the Committee concluded that "where such payments could be obtained by the client without the services of an attorney, a contingent fee for securing these payments would be per se unreasonable" within the meaning of DR 2-105(A). *Id.* The Committee rationalized this conclusion by noting that where a matter does not involve an inherent risk of non-payment and merely entails the performance of ministerial tasks, contingent fee arrangements are generally inappropriate. *Id.; accord* Va. Standing Comm. Legal Ethics, Legal Ethics Op. 1606 (1994) ("This Committee . . . continues to believe that ministerial matters that carry no risk, such as recovering funds that could be obtained by the client without the services of the lawyer, are not matters in which a contingent fee arrangement is proper.

These opinions, while not binding on the Court, are most cogent on the facts of the instant matter, especially since existing case precedent is of little assistance. As indicated in Part III of this Memorandum, there will be no legal efforts

required to secure a claimant's pro rata distribution. The only imaginable efforts required of attorneys will be the ministerial acts of calculating his client's pro rata distribution, ensuring that he has his client's correct address, typing an envelope and mailing a check to his client. In light of these considerations, the Court determines that, absent a showing of exceptional circumstances, any fee exceeding 10% of a pro rata distribution is "per se" unreasonable, shocks the conscience of the Court, and will be disallowed pursuant to this Court's inherent powers to supervise the bar.[10]

B. Inherent equitable powers

[19] The Court has broad equitable powers to attain the same ends. As stated heretofore, existing precedent provides little guidance given the nature of this case. Many cases, for example, involve a limitation of fees under Federal Rule of Civil Procedure 23 in a class action context. Whatever the procedural posture, the *substantive concerns* expressed by various courts that have limited attorneys' fees are fully applicable in this case.

Most recently, the Southern and Eastern Districts of New York approved a new class settlement proposal in the Johns-Manville class action litigation, which included a 25% cap on attorneys' fees recoverable by counsel. The courts relied on Federal Rule of Civil Procedure 23 as well as their "supervisory power over members of the bar and [their]

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[10] It is to be borne in mind that counsel has already received, in the vast majority of instances, fees of at least one-third of the *gross* settlement amount, plus costs. These fees, in many instances, exceed $100,000.00 per claim, and the aggregate fees received by some counsel, especially those with hundreds of cases, runs as high as several million dollars per attorney or law firm. Generally, the sole efforts related to such compensation consist of garnering medical records and advising a client whether to accept a non-negotiable settlement offer.

obligation to safeguard the rights of mass-litigation plaintiffs." *In re Joint Eastern* and *Southern Dist. Asbestos Litig.*, 878 F.Supp. 473, 559. In this regard, the courts made some pertinent observations:

> In *any* mass tort case, there is an opportunity for a small number of attorneys, each individually representing large numbers of potential claimants, to secure for themselves huge attorneys' fees under individual contingency fee contracts that bear little or no relation to the actual work to be done or the risks in the case. The problem is particularly acute in the context of a stipulated settlement such as the instant one, where subsequent legal work on behalf of most individual claimants will be relatively routine, mechanical and almost certain to result in recovery.

878 F.Supp. at 558 (emphasis added). The Court also noted the "reality" that

> the attorney and client must be considered together for purpose of deciding reasonable fees. In general, the claimants in a mass tort case receive less than they deserve under a perfect system of compensation, while the attorneys get more. Some of the "loss" in compensation can fairly be shifted from the clients to their attorneys.

Id. at 561.

This Court subscribes fully to this commentary. Throughout the Robins bankruptcy, a relatively small number of lawyers have represented a large number of claimants. These lawyers, in general, have been paid handsomely considering the low risk levels involved in the generally routine and mechanical representation of Dalkon Shield Claimants. This is not to say that attorneys lacked diligence in representing their clients, especially in the few cases which have proceeded to arbitration or litigation; rather, the Court determines that attorney compensation on the underlying recovery, ranging from one-quarter to one-half of the amount

recovered, is commensurate with the risk level and degree of legal skill required of such representation.[11]

Now that the Trust has concluded that sums separate from and in addition to any underlying recovery will be automatically paid to claimants on a pro rata basis, the time has come for this Court to exercise its inherent power to protect the interest of claimants in maximizing the recovery to which they are entitled. Indeed, the Court has the "obligation to ensure that the fruits of the [pro rata distribution] are not denied to [the claimants] by unnecessary and inappropriate legal expenses," especially since "plaintiffs in class *and other mass actions* are typically less sophisticated and aware of the rights at stake and the fairness of legal charges than the attorneys who represent their interests." 878 F.Supp. at 560 (emphasis added); *see also Rosquist*, 692 F.2d at 1111 (courts should be more willing to review attorneys' fees where plaintiffs are disadvantaged in assessing their rights and bargaining accordingly); *Dunn*, 602 F.2d. at 1109 (inherent power more frequently exercised when clients are "especially vulnerable to overreaching").

In summation, the Court concludes that any fee in excess of 10% of a claimant's pro rata payment is per se unreasonable under DR 2-105(A) of the Virginia Rules of Professional Responsibility. Upon distribution of the pro rata amounts, the lawyers generally will have been fully paid for all their efforts expended on the underlying claim and any further services in relation to the pro rata distribution will be purely ministerial. Moreover, fees imposed on the distribution in excess of 10% will only deprive claimants, who plainly stand at a comparative disadvantage in this situation, of their full and just recovery.

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[11] For example, the Court again notes that there are absolutely *no negotiations* during any stage of the claims resolution process. *See supra* note 8.

Consequently, such fees shock the conscience of this Court and, absent extenuating circumstances, will be disallowed.

V.

[20-22] Even though the Court concludes that fees in excess of 10% are per se unreasonable given the unique nature of the Robins bankruptcy, including the claims resolution process and, most recently, the announcement of a pro rata distribution, the Court will nevertheless conduct the reasonableness inquiry mandated by the Fourth Circuit in *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226-27 (4th Cir.), *cert. denied*, 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978). Under *Barber*, a district court must make "detailed findings with regard to the twelve factors relevant to the determination of reasonable attorneys' fees in any case where such determination is necessary." *Id.* (*citing Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (1974)). These factors include:

(1) the time and labor expended;

(2) the novelty and difficulty of the questions raised;

(3) the skill required to properly perform the legal services rendered;

(4) the attorney's opportunity costs in pressing the instant litigation;

(5) the customary fee for like work;

(6) the attorney's expectations at the outset of the litigation;

(7) the time limitations imposed by the client or circumstances;

(8) the amount in controversy and the results obtained;

(9) the experience, reputation and ability of the attorney;

(10) the undesirability of the case within the legal community in which the suit arose;

(11) the nature and length of the professional relationship between attorney and client; and

(12) attorneys' fees awards in similar cases.

Id. at 226 n. 28.[12]

To reiterate, by the time the pro rata is distributed, all claimants will have been fully compensated for their injuries, and their attorneys will be entitled to their corresponding fee as full compensation for their efforts in securing their client's underlying recovery. This Court does not purport to review any fees received on the underlying claim. Rather, the Court will review the reasonableness of fees payable only out of the pro rata distribution and will apply the *Johnson* factors accordingly.[13]

Applying these factors to this Court's review of fees charged on the pro rata distribution, while somewhat difficult

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[12] Movants argue that the appropriate question is whether the "fee" is reasonable, not whether the "percentage" is reasonable. From this premise, they state that there is not yet any "fee" that can be considered reasonable or unreasonable in this matter because the pro rata has not been distributed.

This argument is unpersuasive. Indeed, a legal fee can either refer to an hourly dollar rate, a flat dollar rate or a contingency percentage. *See* Black's Law Dictionary 614 (6th ed. 1990) (defining "attorney fees" as a "[c]harge to client for services performed (e.g., hourly fee, flat fee, contingency fee)"). Thus, a court is free to examine the reasonableness of a percentage as well as absolute dollar amounts, especially under the facts of the instant matter.

[13] Movants argue that the proper focus should be on an attorney's efforts throughout the representation and that assessing reasonableness of fees at this juncture is not possible because many offers remain outstanding and many ADR hearings, arbitration hearings and court cases remain pending. This argument, however, assumes that which this Court has already rejected–that the pro rata payment is the direct result of attorney effort and part and parcel of the compensation of underlying claims. To the contrary, the pro rata must be considered a "bonus" payment separate and distinct from the underlying awards.

given the unusual nature of this matter, reveals that fees in excess of 10% on any pro rata distribution are unreasonable. To reiterate, attorney efforts expended on the pro rata will be absolutely minimal, requiring little time or legal expertise and involving little risk. Second, while questions may arise regarding the calculation of a claimant's pro rata share or the validity of a claimant's address, there will he no legal questions involved in forwarding the payment to the claimants. Third, there is little or no opportunity cost in assuming the ministerial tasks associated with the distribution, as related efforts will take little or no time. As for the fees customarily charged for such services, the Standing Committee on Ethics of the Virginia State Bar plainly concludes that compensation for ministerial acts should be minimal. Fifth, no Movant can legitimately claim that he expected, from the outset of this litigation, to receive compensation through a pro rata payment to claimants; indeed, the Trustees were unsure of the Trust's ability to compensate all timely claims, not to mention its ability to make a bonus payment, until relatively recently.[14] Sixth, any amount in controversy and any results obtained will not flow from the efforts of counsel, but will depend entirely on the funds remaining in the Trust after the full payment of all underlying claims. *See supra* Part I (discussing factors contributing to the creation of the pool of funds available for the pro rata distribution). Finally, the remaining factors (#'s 9-12) are, as the Trust notes, difficult to apply to this case as they seem more applicable to a pure litigation context. However, even if they are deemed to militate in favor of Movants, the Court concludes that the factors previously addressed far outweigh any that favor Movants and that, under

[14] Moreover, the record reveals that many Movants fought Plan confirmation on the specific belief that there were insufficient funds in the Trust to compensate all claimants on their underlying claims.

the *Barber* test, fees exceeding 10% of any pro rata distribution are unreasonable and will be disallowed.

VI.

In summary, the Court concludes that it has jurisdiction to limit attorneys fees charged on the pro rata distribution. The Court is also convinced that a case or controversy exists within the meaning of Article III of the United States Constitution. Finally, the Court, in drawing upon its inherent powers to review attorneys' fees, concludes that fees charged on the pro rata distribution in excess of 10% are both *per se* unreasonable and unreasonable under *Barber*. This Court will never lose sight of the underlying goal of the Plan: full, fair and expeditious compensation to the hundreds of thousands of women injured by the Dalkon Shield. This goal in no way suggests that attorneys should not be reasonably compensated for their efforts. It does, however, dictate that they should be barred from charging fees that unreasonably take monies from the claimants, thus shocking this Court's conscience. Because fees in excess of 10% of any pro rata distribution generally may be so characterized, they will be disallowed, subject to

reinstatement under the terms of this Court's Order dated March 1, 1995.[15]

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[15] The Court is mindful that there may be, at a later date, situations in which an attorney is aggrieved by this disallowance based on events occurring after the date of this Memorandum. For example, assume that six months from the date of this Memorandum an attorney who has *never* before represented a Dalkon Shield claimant is retained by a claimant who has rejected her offer and wishes to proceed to litigation. The retained attorney, unaware of the instant matter, agrees to represent the claimant for a nominal fee plus costs. In such an extraordinary case, the aggrieved attorney will be permitted to petition this Court for reinstatement of fees charged on the pro rata distribution under terms and conditions similar to those set forth in this Court's Order dated March 1, 1995.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

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In re

A. H. ROBINS COMPANY, INCORPORATED,

Chapter 11
Case No. 85-01307-R
Retained Proceeding
(Judge Merhige)

Debtor.

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DEBTOR'S SIXTH AMENDED AND RESTATED PLAN OF REORGANIZATION

A. H. Robins Company, Incorporated, the above-named Debtor, hereby proposes the following amended and restated plan of reorganization pursuant to Chapter 11 of the Bankruptcy Code.

ARTICLE V
TREATMENT OF CLASSES IMPAIRED UNDER PLAN

5.01 *Dalkon Shield Personal Injury Claims.* On the Consummation Date, the Debtor will, in full satisfaction and discharge of all Claims in Class 3A (i.e., Dalkon Shield Personal Injury Claims), and all Dalkon Shield Liquidated Claims of Personal Injury Claimants (which Claims are in Class 4 and are not impaired), cause the following to occur: (a) the execution and delivery by the Debtor of the Claimants Trust Agreement, thereby establishing the Claimants Trust; (b)

the payment by the Debtor of the Claimants Trust Funding Payment of $2.255 billion to the Claimants Trust, less the amount, if any, previously deposited into the Claimants Trust in accordance with Section 6.07 of the Plan; (c) the performance by the Debtor of its obligations under Section 5.02 of the Plan; and (d) the transfers with respect to any Unused Insurance Policies as provided directly below. Additional funding in the amount of $5 million will be supplied to the Claimants Trust by that portion of the Robins Family Contribution allocated to the Claimants Trust and further additional funding may be supplied to the Claimants Trust through Transfer Payments from the Other Claimants Trust. Funding and excess insurance will be supplied to the Claimants Trust by Aetna in accordance with Section 6.06 of the Plan.

On the Consummation Date, the Debtor also will transfer, assign and deliver to the Claimants Trust, for the benefit of the Claimants Trust as an insured party thereunder, any of the Unused Insurance Policies which are assignable without cancellation or reduction of coverage and which the Debtor elects to so transfer, assign and deliver; and in respect of such Unused Insurance Policies, which the Debtor does not elect to so transfer, assign and deliver, the Debtor will take all such actions as are necessary or desirable to enable the Claimants Trust, at its expense, to obtain and enjoy the benefits of coverage thereunder, including, without limitation, pursuit in the name of the Debtor (subject to control by, and at the expense of, the Claimants Trust) of all claims under the Unused Insurance Policies and assignment by the Debtor to the Claimants Trust of all recoveries thereunder.

The Claimants Trust will assume full responsibility for resolving all Dalkon Shield Personal Injury Claims pursuant to the Claimants Trust Agreement and the Claims Resolution Facility (both of which are incorporated herein and, made a part hereof), for making payments on account of Dalkon Shield Personal Injury Claims that become Allowed Dalkon

Shield Personal Injury Claims under the conditions set forth in the Claimants Trust Agreement, for fulfilling its other obligations under the Claimants Trust Agreement, for paying Dalkon Shield Liquidated Claims of Personal Injury Claimants that are or become Allowed Claims, and for paying its own costs and expenses, all as set forth more fully herein and in the Claimants Trust Agreement.

ARTICLE VIII
EFFECTS OF PLAN CONFIRMATION

8.01 *Discharge.* Except as otherwise expressly provided in the Plan, the confirmation of the Plan shall discharge the Debtor effective immediately from any Claim and any "debt" (as that term is defined in section 101(11) of the Code), and the Debtor's liability in respect thereof is extinguished completely, whether reduced to judgment or not, liquidated or unliquidated, contingent or noncontingent, asserted or unasserted, fixed or not, matured or unmatured, disputed or undisputed, legal or equitable, known or unknown, that arose from any agreement of the Debtor entered into or obligation of the Debtor incurred before the Confirmation Date, or from any conduct of the Debtor prior to the Confirmation Date, or that otherwise arose before the Confirmation Date, including, without limitation, all interest, if any, on any such debts, whether such interest accrued before or after the date of commencement of the Case, and including, without limitation, all debts based upon or arising out of Dalkon Shield Claims or Dalkon Shield Liquidated Claims, and from any liability of a kind specified in sections 502(g), 502(h) and 502(i) of the Code, whether or not a proof of claim is filed or deemed filed under section 501 of the Code, such Claim is allowed under section 502 of the Code, or the holder of such Claim has accepted the Plan.

8.02 *Revesting.* Except as otherwise expressly provided in the Plan, on the Confirmation Date the Debtor will be vested with all of the property of the estate free and clear of all claims, liens, encumbrances, charges and other interests of creditors and equity security holders, and may operate its businesses free of any restrictions imposed by the Code or by the Court; provided, however, that the Debtor shall continue as a debtor in possession under the Code until the Consummation Date, and, thereafter, the Debtor may operate its business free of any restrictions imposed by the Code or the Court.

8.03 *Release.* Except as otherwise expressly provided in the Plan, on the Confirmation Date, (a) all Persons (i) who have held, hold or may hold Claims, including, without limitation, Dalkon Shield Claims or Dalkon Shield Liquidated Claims or (ii) who have held, hold or may hold Robins Common Stock, and (b) the Debtor, the Successor Corporation and their Affiliates, in consideration for the promises and obligations of the Debtor and the Successor Corporation under the Plan, including the establishment and funding of the Trusts, will be deemed to have forever waived, released and discharged all rights or claims, whether based upon tort, fraud, contract or otherwise, which they heretofore, now or hereafter possess or may possess against any Person (excluding only Unreleased Claims) based upon or in any manner arising from or related to (w) the Dalkon Shield, (x) the research and development, manufacture, distribution, sale, provision, recommendation, insertion, use or removal of a Dalkon Shield, (y) the processing, adjustment, settlement, payment, defense, negotiation or handling of any claims, demands, suits, causes of action or proceedings, based upon or relating in any way to the Dalkon Shield, or (z) the failure to warn, disclose or provide information concerning, or to take remedial action with respect to, the Dalkon Shield, including, without limitation, (a) those for indemnity, whether

contractual or otherwise, contribution, subrogation and reimbursement with respect to any claim, demand, proceeding, suit or cause of action that has been, is, or may be asserted against any Person based upon or in any manner arising from or relating to any of the matters enumerated or described in (w), (x), (y) and/or (z) above, (b) those for death or personal injuries, including emotional distress, (c) those for damages, including punitive damages, (d) those for attorneys' fees and other expenses, fees or costs, (e) those for any possible economic loss or loss of consortium, (f) those for damages to reputation, and (g) those for any equitable remedy, all such rights and claims being hereinafter referred to as "Dalkon Shield-Related Claims".

8.04 *Injunction.* Except as otherwise expressly provided in the Plan, the Confirmation Order will provide that (a) all Persons (i) who have held, hold or may hold Claims, including without limitation, Dalkon Shield Claims or Dalkon Shield Liquidated Claims, or (ii) who have held, hold or may hold Robins Common Stock, and, (b) the Debtor, the Successor Corporation and any of their Affiliates, are permanently enjoined on and after the Confirmation Date (a) from commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Claim or any Dalkon Shield-Related Claim against the Debtor, its shareholders, the Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), the Trusts or any other Person or the property of the Debtor, the Successor Corporation, any of the Affiliates thereof, or of any other Person, (b) from the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree, or order against the Debtor, its shareholders, the Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), or any other Person or the property of the Debtor, the Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), or

any other Person with respect to any such Claim or any Dalkon Shield-Related Claim, (c) from creating, perfecting or enforcing any encumbrance of any kind against the Debtor, its shareholders, the Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), or any other Person or against the property of the Debtor, its shareholders, the Successor Corporation, any of the Affiliates thereof, or any other Person with respect to any such Claim or any Dalkon Shield-Related Claim, (d) from asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due the Debtor, its shareholders, the Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), or any other Person or against the property of the Debtor, its shareholders, the Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), or any other Person with respect to any such Claim or any Dalkon Shield-Related Claim, and (e) from any act, in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan, the Claims Resolution Facility and the Trust Agreements; provided, however, that such injunction shall not impair the rights of Persons with Dalkon Shield Claims or Dalkon Shield Liquidated Claims from asserting Unreleased Claims. After properly electing trial by jury under Option 3 of the Dalkon Shield Claimants Trust Claims Resolution Facility, a Person shall, notwithstanding this section, be entitled to continue or commence a jury trial against the Claimants Trust for the purpose only of obtaining a judgment for compensatory damages against the Trust liquidating that person's Dalkon Shield Claim so that it may be paid with other Allowed Dalkon Shield Personal Injury Claims in the ordinary course of the Trust's operations consistent with the provisions of the Claims Resolution Facility and such other procedures as the Trustees may establish pursuant to the Claims Resolution Facility. The holder of any such judgment

shall be enjoined from executing against either of the Trusts or their assets.

8.05 *Retention of Jurisdiction.* Notwithstanding entry of the Confirmation Order or the Consummation Date having occurred, the Court will retain jurisdiction (a) to determine any Disputed Claims (other than Dalkon Shield Personal Injury Claims and Dalkon Shield Other Claims), except as provided in the Trust Agreements, (b) to determine requests for payment of Claims entitled to priority under section 507(a)(1) of the Code, including compensation of and reimbursement of expenses of parties entitled thereto, (c) to resolve controversies and disputes regarding interpretation and implementation of the Plan, the Trust Agreements, the Claims Resolution Facility, and releases obtained by the Trusts (or either of them), and amendments of the Trust Agreements, and, in accordance with the provisions of the Claims Resolution Facility, any disputes relating to whether or not a timely and proper notice of claim was filed or whether a Disallowed Claim should be reinstated, (d) to enter orders in aid of the Plan, the Trust Agreements, the Claims Resolution Facility, and releases obtained by the Trusts (or either of them), including, without limitation, appropriate orders (which may include contempt or other sanctions) to protect the Debtor, the Successor Corporation, AHP, any of the Affiliates thereof, and other Persons from actions prohibited under Article VIII of the Plan, (e) to modify the Plan pursuant to Section 9.06 of the Plan, (f) to determine any and all applications, Claims, adversary proceedings and contested or litigated matters pending on the Consummation Date, (g) to allow, disallow, estimate, liquidate or determine any Claim (excluding Dalkon Shield Claims) against the Debtor and to enter or enforce any order requiring the filing of any such Claim before a particular date, (h) to determine any and all pending applications for the rejection or disaffirmance of executory contracts or leases, and to hear and determine, and

if need be to liquidate, any and all Claims arising therefrom, (i) over actions challenging the validity and enforceability of the releases and injunctions referred to in Sections 8.03 and 8.04 of the Plan, and (j) to enter a final decree closing the Case; provided, however, that nothing contained in this Section 8.05 is intended to confer jurisdiction upon the Court over, or grant authority to monitor, the day-to-day operations of the Trusts or the Claims Resolution Facility.

9.06 *Modification of Plan.* The Debtor reserves the right, in accordance with the Code, and subject to the prior consent of AHP, to amend or modify the Plan prior to the entry of a Confirmation Order. After the entry of the Confirmation Order, the Debtor may, upon order of the Court, and subject to the prior consent of AHP (and, after the Consummation Date, solely with respect to modifications of the Plan that materially affect a Trust, with the consent of the Trustees of such Trust), amend or modify the Plan in accordance with section 1127(b) of the Code, or remedy any defect or omission or reconcile any inconsistency in the Plan in such manner as may be necessary to carry out the purpose and intent of the Plan.

ANNEX 2
PLAN EXHIBIT A

CLAIMANTS TRUST AGREEMENT

THIS CLAIMANTS TRUST AGREEMENT is between A. H. Robins Company, Incorporated, as trustor, and the Trustees, pursuant to the Sixth Amended and Restated Plan of Reorganization of A. H. Robins Company, Incorporated (the "Plan").

A. Robins filed a petition for reorganization under chapter 11 of the Code on August 21, 1985.

B. The Plan provides, pursuant to Section 8.01 thereof, for the discharge, among other things, of debts based upon or arising out of Dalkon Shield Claims and, pursuant to Section 5.01 thereof, for the satisfaction of Dalkon Shield Personal Injury Claims and Dalkon Shield Liquidated Claims of Personal Injury Claimants pursuant to this Agreement.

C. This Agreement is to establish, pursuant to the Confirmation Order, a trust, the principal purpose of which is to resolve and satisfy Dalkon Shield Personal Injury Claims and Dalkon Shield Liquidated Claims of Personal Injury Claimants against Robins or the Successor Corporation (or any related person as defined in section 468B(d)(3) of the Internal Revenue Code or formerly related person) arising out of personal injury, death, or property damage.

Now, THEREFORE, this Agreement witnesseth and it is hereby declared, in accordance with the Confirmation Order, as follows:

ARTICLE I
DEFINITIONS

1.01 *Incorporation of Definitions.* Unless the context otherwise requires, all capitalized terms used in this Agreement and not otherwise defined shall have the meanings assigned to them in the Plan.

ARTICLE II
DECLARATION OF TRUST

2.01 *Creation and Name.* There is hereby created the Trust, which shall be known as the "Claimants Trust."

2.02 *Purpose.* The purposes of the Trust are to assume any and all liabilities of Robins, its successors in interest (including the Successor Corporation) and any of their Affiliates, present or future, for, and to satisfy as fully, fairly and expeditiously as practicable, all Dalkon Shield Personal Injury Claims and Dalkon Shield Liquidated Claims of Personal Injury Claimants; to satisfy any such claims as and to the extent provided in Article V of this Agreement and in the Claims Resolution Facility; and to qualify as a Designated Settlement Fund ("DSF") which is non-reversionary, pursuant to section 468B(d)(2) of the Internal Revenue Code.

To accomplish the foregoing, the Trust hereby (i) assumes and shall be directly liable for any and all liabilities, present or future, whether prior to the creation of the Trust such liabilities were liquidated or non-liquidated, contingent or non-contingent, asserted or unasserted, fixed or not, matured or unmatured, disputed or undisputed, legal or equitable, known or unknown, of Robins, its successors in interest (including the Successor Corporation) and any of their Affiliates, present or future, for all Dalkon Shield Personal Injury Claims and Dalkon Shield Liquidated Claims held by Personal Injury Claimants (without taking into account the discharge provided

for in Section 8.01 of the Plan), as provided in the Claims Resolution Facility; (ii) agrees to conserve and protect the Trust estate so as to enable the Trustees to satisfy as fully as possible all claims assumed by the Trust in accordance with the terms of the Plan and this Agreement, with settlement to be preferred over arbitration, arbitration to be preferred over resort to litigation, and fair and efficient resolution of claims to be preferred over all else; (iii) agrees to collect, invest and reinvest amounts due to the Trust; (iv) agrees to defend against, and assume the defense of, and pay all costs and fees (including attorneys' fees) of the defense of any and all such Dalkon Shield Personal Injury Claims and Dalkon Shield Liquidated Claims of Personal Injury Claimants against the Trust, Robins, any of its Affiliates present or future and their successors in interest (including the Successor Corporation or its Affiliates); (v) agrees to assert and defend (and appeal to the highest appellate court willing to hear such appeal any adverse decision regarding) the enforceability of the releases and injunctions referred to in Sections 8.03 and 8.04 of the Plan, except with respect to claims assumed by the Other Claimants Trust, and, to the extent applicable, the discharge referred to and described in Section 8.01 of the Plan; this duty shall terminate in a given jurisdiction when a Final Order of the highest appellate court of competent jurisdiction in that jurisdiction determines that the releases and injunctions or the discharge do not require dismissal of such action or proceeding or are unenforceable; *provided, however,* that this obligation shall be subject to Rule 11 of the Federal Rules of Civil Procedure or similar state rules or laws, as the case may be; and (vi) agrees to manage the Trust and report on its status and activities.

2.03 *Transfer of Assets; Beneficiaries.* Pursuant to the Confirmation Order, Robins hereby transfers and assigns to the Trust, to be held in trust for the holders of Dalkon Shield Personal Injury Claims and Dalkon Shield Liquidated Claims

of Personal Injury Claimants (each a "Beneficiary" and collectively, the "Beneficiaries"), the Claimants Trust Funding Payment, having heretofore obtained all consents and taken all other steps prerequisite to such transfer and assignment. Additional assets shall be transferred to the Trust from the Other Claimants Trust in accordance with the terms of said Trust and Schedule "A" to the Other Claimants Trust Agreement. Additional assets may also be transferred to the Trust in accordance with the Plan, and the Trust shall receive such assets if so transferred (subject to the limitations described in Section 4.03(b)(i) of this Agreement). All assets received by the Trust shall be held, administered and distributed under the terms of this Agreement.

2.04 *Further Assurances; Cooperation.* Robins and the Successor Corporation shall take such actions and deliver such certificates and other documents as the trustees may reasonably request in order to effectuate, perfect, confirm and evidence the transfer and assignment to the Trust of the assets intended to be transferred and assigned pursuant to Section 2.03 hereof and the validity and efficacy of such transfer and assignment. Robins shall transfer to the Trust such claims files and other documents relating to Dalkon Shield Personal Injury Claims as are under its custody or control. The Trustees shall (i) use their best efforts to provide, to the fullest extent possible, previously developed discovery materials including depositions and other documents as a means of providing any discovery ordered or permitted by any arbitrator in an arbitration hearing or court of competent jurisdiction in a trial by jury, without calling upon Robins, the Successor Corporation, their present or former officers, directors, employees, agents or representatives, (ii) attempt, through court rulings or consensual procedures, to consolidate and coordinate pre-trial discovery and/or trial proceedings, and (iii) otherwise use their best efforts to minimize the need for Robins, its present or former officers, directors, employees,

agents, or representatives to appear in any trial or arbitration proceeding. Robins and the Successor Corporation shall furnish reasonable cooperation to the Trust, including providing evidence.

ARTICLE IV
FINANCIAL MANAGEMENT

4.01 *Accounts.* The Trustees shall establish such funds and accounts with such Persons as they shall, in their discretion, deem necessary or advisable for carrying out the purposes of the Trust.

4.02 *Investments.* Investments of monies held in the Trust estate shall be administered in view of the manner in which individuals of ordinary prudence, discretion and judgment would act in the management of their own affairs, subject to the following limitations and provisions:

(a) The Trust shall not acquire, or hold for longer than 90 days, any long-term debt securities, participation certificates or similar instruments unless (i) such securities, certificates or instruments are rated "Aa" or higher by Moody's Investors Service, Inc. ("Moody's") or "AA" or higher by Standard & Poor's Corporation ("S&P's") or (ii) have been issued or fully guaranteed as to principal and interest by the United States of America or any agency or instrumentality thereof.

(b) The Trust shall not acquire, or hold for longer than 90 days, any commercial paper unless (i) such commercial paper is rated "Prime-1" or higher by Moody's or "A-1" or higher by S&P's and (ii) the senior long-term debt of the commercial paper issuer is rated "Aa" or higher by Moody's for "AA" or higher by S&P's.

(c) The Trust shall not acquire, or hold for longer than 90 days, any equity security other than preferred

stock rated "Aa" or higher by Moody's or "AA" or higher by S&P's.

(d) The Trust shall not acquire any securities or other instruments issued by any Person (other than debt securities or other instruments issued or fully guaranteed as to principal and interest by the United States of America or any agency or instrumentality thereof) if, following such acquisition, the aggregate market value of all securities and instruments issued by such Person held by the Trust would exceed 2% of the aggregate market value of the Trust estate. The Trust shall not hold any securities or other instruments issued by any Person (other than debt securities or other instruments issued or fully guaranteed as to principal and interest by the United States of America or any agency or instrumentality thereof) to the extent that the aggregate market value of all securities and instruments issued by such Person held by the Trust would exceed 5% of the aggregate market value of the Trust estate. The Trust shall not acquire any securities or other instruments issued by any Person (other than debt securities or other instruments issued or fully guaranteed as to principal and interest by the United States of America or any agency or instrumentality thereof) unless, at the time of acquisition, the securities or other instruments so acquired represent not more than 5% of all outstanding securities or instruments of the same class and series.

(e) The Trust may acquire certificates of deposit, time deposits and banker's acceptances only (i) if issued by a bank whose senior long-term debt is rated "Aa" or higher by Moody's or "AA" or higher by S&P's, (ii) if issued by a bank whose name appears on a list, maintained by the Trust and reviewed quarterly by the Trustees or an investment manager designated by them, of banks approved by the Trustees or such investment manager,

and (iii) if the term to maturity from the date of acquisition does not exceed two years and one day. The limitations of (a) and (d) above shall not apply to such certificates of deposit, time deposits and banker's acceptances.

In determining investments to be held by the Trust, due regard shall be given by the Trustees to safety of principal and to production of reasonable amounts of current income. The Trustees shall not be under any obligation to invest Trust assets for capital appreciation, in view of the purposes for which the Trust was created, but are not prohibited from so doing.

4.03 *Trust Powers.*

(a) Pursuant to the Confirmation Order, subject to the limitations set forth in this Agreement, and subject to the provisions and limitations of the Plan and the Claims Resolution Facility, the Trustees shall have the power to take any and all actions as, in the sole judgment and discretion of the Trustees, are necessary or advisable to effectuate the purposes of the Trust, including without limitation, each power expressly granted in Section 4.03(b) of this Agreement and any power reasonably incidental thereto.

(b) Without limiting the generality of Section 4.03(a) of this Agreement, and subject to the other provisions of this Agreement, the Trustees shall have the power:

(i) to receive cash and other additions to the Trust estate from any source (except stock or indebtedness of Robins, the Successor Corporation, AHP, or any related person (within the meaning of Section 468B(d)(3) of the Internal Revenue Code), provided such additions are made pursuant to the Confirmation Order or another order of the Court) and to hold, administer, and distribute such additions as a part of the Trust estate;

(ii) to invest and reinvest the funds of the Trust as provided in this Agreement;

(iii) to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle Dalkon Shield Personal Injury Claims and Dalkon Shield Liquidated Claims held by Personal Injury Claimants in favor of or against the Trust, including, without limitation, accepting the Robins Family Contribution in exchange for a release of the Robins family, all as provided in Sections 6.08 and 8.03 of the Plan, dealing with claims assumed by the Trust pursuant to Section 2.02 hereof, and employing and compensating legal counsel, accountants and other parties deemed by the Trustees to be qualified as experts in connection therewith (subject in all respects to the provisions and limitations of this Agreement and the Claims Resolution Facility), as the Trustees shall in their sole discretion deem best;

(iv) to employ and compensate counsel, accountants, appraisers, and other parties deemed by the Trustees to be qualified as experts on such matters as may arise before them, and the opinion of such parties on any matters submitted to them by the Trustees shall be full and complete protection to the Trustees with regard to any action taken by the Trustees hereunder in good faith and in accordance with such opinion;

(v) to rely upon any affidavit, certificate, letter, notice, telegram, or other paper, or upon any telephone conversation or other oral communication, believed by the Trustees to be genuine and sufficient and upon any other evidence believed by the Trustees to be genuine and sufficient, and to be protected and saved harmless in respect of all payments or distributions made hereunder if made in good faith and without actual notice or knowledge of the changed condition or status of any

person receiving payments or other distributions upon a condition;

(vi) to indemnify the Trustees, employees and agents of the Trust and the Additional Indemnitees in accordance with Section 3.07 of this Agreement, to purchase insurance to effect such indemnification, in accordance with such Section 3.07, and to meet the obligations of the Trust under Article V hereof;

(vii) to appoint such officers, hire such employees, and engage such legal, financial and other advisors and agents as are deemed necessary by the Trustees for the proper administration of the Trust and the Claims Resolution Facility (subject in all respects to the provisions and limitations of the Claims Resolution Facility), and to compensate such officers, employees, advisers and agents for their services;

(viii) to enter into such other arrangements with third parties as are deemed by the Trustees to be useful in carrying out the purposes of the Trust (including, without limitation, engaging a financial institution to act as paying agent, depository, custodian or trustee with respect to funds, reserves or accounts created hereby or established pursuant hereto), and to compensate such third parties for their services;

(ix) to delegate any or all of the discretionary power and authority herein conferred at any time with respect to the investment of the Trust estate to any one or more nationally recognized individual or institutional advisors or investment managers, and to compensate such advisors and managers for their services;

(x) to institute any action or proceeding at law or in equity for the collection of the sums due the Trust, or otherwise to advance the interests of the Trust in a manner not inconsistent with the terms of the Plan, prosecute any such action or proceeding to judgment or

final decree, enforce any such judgment or final decree, and collect in any manner provided by law the monies adjudged or decreed to be payable; *provided, however,* that, regardless of any deficiency in the Trust or any other reason, the Trust may not institute any action or proceeding at law or in equity against Robins, the Successor Corporation, AHP or any of their Affiliates, present or future, or against any other Person deemed to be released pursuant to the terms of Section 8.03 of the Plan, for the collection of any sums, other than as expressly provided for in the, Plan, in respect of Dalkon Shield Claims or Dalkon Shield Liquidated Claims, prosecute any such action or proceeding to judgment or final decree, or collect in the manner provided by law the monies adjudged or decreed to be payable;

(xi) to acquire, own, lease and convey such real and personal properties, in such locations as the Trustees may deem necessary or desirable for the proper administration of the Trust, but not for purposes of the investment of Trust assets;

(xii) to adopt and amend By-Laws and other rules and procedures not inconsistent with this Agreement, the Plan or the Claims Resolution Facility, as the Trustees may deem necessary or desirable for the governance or administration of the Trust;

(xiii) to supervise and administer the Claims Resolution Facility;

(xiv) to borrow money and issue notes, guaranties and other evidences of indebtedness (which notes, guaranties or other evidences of indebtedness may exonerate the Trustees from personal liability with respect thereto), to the extent the Trustees deem necessary or desirable for the proper administration of the Trust; *provided, however,* that except for contracts or leases for the purchase or lease of items necessary for the proper

administration of the Trust, the Trustees shall have no power to borrow money or issue notes, guaranties or other evidences of indebtedness in an amount outstanding at any one time in excess of $1,000,000;

(xv) to assign, pledge, or otherwise transfer or encumber Trust assets to the extent the Trustees deem necessary or desirable in the ordinary course of administration of the Trust;

(xvi) to obtain and pay the premiums for such fidelity bonds and other insurance policies as the Trustees may deem reasonably necessary or desirable for the protection of the Trust or the Trustees;

(xvii) to adjudicate all matters relating to, and to authorize payments from, the Primary Excess Policy and the secondary excess policy in respect of the Trust, if any;

(xviii) to provide administrative and claims resolution services in respect of the Outliers Policy and other similar policies subsequently issued, on a cost reimbursement basis;

(xix) to do all those acts and things necessary or desirable to implement the terms of the Qualified Breland Settlement including the receipt of funds, defense and resolution of claims and disbursement of funds as provided in such settlement;

(xx) to effect a subrogation of payments to be received from the Other Claimants Trust in order to call upon the Primary Excess Policy in the event that there are not sufficient funds of the Trust in the reasonable judgment of the Trustees to make further payments on claims, without regard to further payments to be received from the Other Claimants Trust, as provided for in Exhibit E to the Plan; and

(xxi) to do all other acts and things not inconsistent with the provisions of this Agreement, the Claims Resolution Facility, and the Plan which the Trustees may

deem reasonably necessary or desirable for the proper management of the Trust, in the same manner and to the same extent as an individual might or could do with respect to his own property, subject to the limitations of applicable law governing the conduct of fiduciaries.

ARTICLE V
DISTRIBUTIONS; CLAIMS RESOLUTION FACILITY

5.01 *Required Distributions.*

(a) The Trustees shall distribute to each holder of an Allowed Dalkon Shield Personal Injury Claim such amount as may be determined in accordance with Section 5.02 of this Agreement and the Claims Resolution Facility.

(b) Pursuant to the Confirmation Order, the Trust shall assume and control the defense of any Dalkon Shield Personal Injury Claim and Dalkon Shield Liquidated Claim of a Personal Injury Claimant, whether asserted against the Trust, Robins, any of its Affiliates, present or future, and/or their

5.02 *Payment of Claims and Incidental Expenses.*

(a) A Dalkon Shield Personal injury Claim shall be assessed and paid by the Trust as provided under the Claims Resolution Facility; *provided, however,* that no payment shall be made to any Person unless and until such Person shall have executed a release of all Persons deemed to be released pursuant to the provisions of Section 8.03 of the Plan.

(b) Any holder of a Disallowed Claim shall not be entitled to have his or her claim assessed or paid pursuant to this Agreement or the Claims Resolution Facility (i) unless it shall be determined in accordance with the Claims Resolution Facility that such claim is entitled to be reinstated or reinstated

on a subordinated basis, or (ii) except as such payment is authorized pursuant to the Qualified Breland Settlement.

ARTICLE VI
GENERAL PROVISIONS

6.01 *Irrevocability.* The Trust is irrevocable. Neither Robins, nor its Affiliates, present or future, nor their successors in interest (including the Successor Corporation) may hold any beneficial interest in the income or corpus of the Trust.

6.02 *Recordation.* This Agreement shall be recorded in such places as Robins or the Trustees shall deem necessary or advisable.

6.03 *Termination.*

(a) The Trust shall terminate automatically upon the earlier of (i) the date on which the claims assumed by the Trust have been finally disposed of and the Trustees have certified that, in their judgment, the purposes of the Trust have been fulfilled; (ii) December 31, 2008; or (iii) if the Trustees have procured and have in place irrevocable insurance policies and have established claims-handling agreements and other necessary arrangements with suitable third parties adequate to discharge all expected remaining obligations and expenses of the Trust in a manner consistent with the terms of this Trust Agreement and in accordance with the Claims Resolution Facility and the Plan, the date on

OVERALL SUMMARY

I. If settlement of the Breland Case is approved by the District Court and upheld on appeal, *at least* $2,585,000,000 will be available to pay claims and administrative expenses of the Trust. The cash will also earn interest, which could result in hundreds of millions more dollars being available to pay your claims and administrative expenses of the Trust.

Total:
$2,585,000,000
before interest

(a.	$2,255,000,000	cash from Debtor
(b.	5,000,000	cash from E. C. Robins and E. C. Robins, Jr.
(c.	250,000,000	insurance from Aetna (Primary Excess Policy)*
(d.	50,000,000	cash from Aetna
(e.	25,000,000	cash from Successor Corporation (from Aetna money)

(f. Unknown amount of unused insurance that Robins and its subsidiaries have for Dalkon Shield claims (believed to be approximately $45 million

Additionally, if the money in the Other Claimants Trust and available under the Outlier Policies of insurance is not needed to pay other types of claims, another $150,000,000 could be

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* Insurance proceeds cannot be used to make distributions in lieu of punitive damages.

available over time to pay your claims and administrative expenses of the Trust.

Total: $150,000,000 before interest	(a.	$50,000,000	insurance from Aetna (Outlier Policy)*
	(b.	50,000,000	insurance from Aetna (Outlier Policy)*
	(c.	50,000,000	cash from Other Claimants Trust**

MAXIMUM TOTAL (EXCLUDING INTEREST ON THE CASH PAYMENTS, WHICH WILL BE SUBSTANTIAL IN AMOUNT) POTENTIALLY AVAILABLE IF SETTLEMENT OF THE BRELAND CASE IS APPROVED:

$2,735,000,000

MINIMUM AMOUNT (EXCLUDING INTEREST ON THE CASH PAYMENTS, WHICH WILL BE SUBSTANTIAL IN AMOUNT) WHICH WILL BE AVAILABLE IF SETTLEMENT OF THE BRELAND CASE IS APPROVED:

$2,585,000,000

** $5,000,000 of the $50,000,000 will be paid to the Other Claimants Trust by E. C. Robins and E. C. Robins Jr., and $45,000,000 will be paid to the Other Claimants Trust by the Debtor.

ANNEX 4
PLAN EXHIBIT C

DALKON SHIELD TRUST
CLAIMS RESOLUTION FACILITY

A. Purpose

The purpose of the facility is to provide all persons full payment of valid claims at the earliest possible time consistent with the efficient design and implementation of the claims resolution facility. This purpose is to be achieved by (1) providing an efficient economical mechanism for liquidating claims which favors settlement over arbitration and litigation, thereby reducing transaction costs, (2) providing claimants with an attractive alternative to trial by jury where settlement is not achieved, (3) providing fair and equitable compensation based upon historic values, updated by current developments, to persons injured by the Dalkon Shield, and (4) providing no compensation to persons not injured by the Dalkon Shield. The Trustees shall, as soon as practicable, design and implement a facility for the resolution of Dalkon Shield Claims. The facility is to be designed and operated in accordance with the guidelines set forth below.

G. Guidelines

The following guidelines shall govern the Claims Resolution Facility and Claims Resolution Process:

3. *Payments.* The Trustees shall pay claims in a manner designed to ensure that all claims are paid in the same proportions. While it is intended that each claimant receive a substantial portion of his or her award immediately upon the determination of her or his claim, the Trustees may withhold some portion of the amounts awarded under Option 3 for claims and pay the balance withheld at such times and in such

amounts as necessary to ensure equality in distribution among claimants and the continued availability of funds to pay all valid non-subordinated claims. The Trustees may also determine that compensatory damages awarded under Option 1 or Option 2 shall be paid in full immediately upon liquidation.

4. *Confidentiality.* Claim files and all communications between the Trust and a claimant or between the Trust and any other person about any claimant are in the nature of settlement discussions and shall be strictly confidential.

8. *Costs.* The Trust and claimants shall each bear their own costs, expenses, and attorneys' fees in connection with the Claims Resolution Process, except as provided otherwise by law.

10. *General Release.* As a condition to making any payment to a claimant, the Trust shall obtain a general release of all Persons except Aetna and the Trust; provided, however, that such general release shall not release claims which are based exclusively on medical malpractice and which cannot be asserted or brought over either in whole or in part, against the Trust, the Other Claimants Trust, Robins, the Successor Corporation, any Affiliates thereof, or any other Person intended to be protected either by the release described in Section 8.03 of the Plan or the injunction described in Section 8.04 of the Plan. Notwithstanding the foregoing, Aetna shall be included in the general release if and when Aetna shall have performed its obligations under a Qualified Breland Settlement, except that if a claimant validly exercised the right, if any, to opt out from the *Breland* class, the general release shall be obtained upon the tender of final payment of the full amount awarded under this claims resolution facility. The Trust shall be released at the time it satisfies the award of

compensatory damages given a Personal Injury Claimant by way of settlement or judgment. If allowed by state law, the endorsing of a check or draft by or on behalf of the claimant shall be additional evidence of such a release.

11. *Applicable Law.* The law to be applied to the settlement or trial of claims shall be the law that is or would have been applicable notwithstanding the pendency of the chapter 11 case; provided, however, that, the statutes of limitations and repose applicable to claims are tolled in accordance with the Bankruptcy Code. Pursuant to this provision, claimants who would have been or are entitled to file suit in Maryland may avail themselves of the Maryland law concerning the accrual and limitation of actions. Notwithstanding anything in this paragraph, punitive damages shall not be paid, except as provided in section 14 below. In order to reduce costs, the Trustees may waive the statute of limitations defense for purposes of settlement and take into account normal deductions for the statute of limitations defense.

14. *Priorities Among Claims.* Claimants who have claims for compensatory damages which are meritorious and which are not time-barred shall have first call on the funds of the Trust. To the extent funds remain after all such claims are paid in full, meritorious compensatory damage claims which are time-barred shall then be administered and paid from the funds of the Trust. To the extent funds (not including Aetna Insurance) remain after all such claims are paid in full, the remaining funds shall be paid in lieu of punitive damages to all claimants (other than holders of Dalkon Shield Liquidated Claims) who received compensatory damage awards from the Trust, on a pro rata basis consistent with such awards. The Trustees may, in their discretion, set a *de minimis* amount below which such payments need not be made.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

IN RE:

A. H. ROBINS COMPANY, INCORPORATED,

Debtor, Chapter 11

Case No. 85-01307-R

Before: HONORABLE ROBERT R. MERHIGE, JR.,
United States District Judge
HONORABLE BLACKWELL N. SHELLEY,
United States Bankruptcy Judge

Motion by movants to vacate order disallowing unreasonable attorney's fees on pro rata distribution.

April 27, 1995
Richmond, Virginia

Gilbert Frank Halasz, RMR
Official Court Reporter
P. O. Box 223
Richmond, VA 23202
(804) 730-9626

1h

PAUL BERGSTROM
WAS SWORN AND TESTIFIED AS FOLLOWS:
DIRECT EXAMINATION.

BY MR. MESHBESHER:

Q. You did prepare some individualized affidavits with respect to a number of clients; is that correct?

A. I did with respect to, I believe 147 or 148 clients, just to give an idea of some of the efforts that went into individualized cases.

Q. Were you able to do it for each client?

A. No. I didn't have time to do it for each case. I just started going through our files and doing them for the ones that I could get my hands on.

Q. Were you the only person that could do that task?

A. Well, Tony Nemo and his brother, who works as an associate of Mike, Michael Nemo, and one other person.

Q. Had to be someone that was familiar with the file?

A. Of course, yes.

Q. And those affidavits were all filed with The Court prior to the filing deadline; is that correct?

A. Yes, sir.

Q. Your Honor, I know that The Court does not want me to go through each individual case, 160 some here, I believe, but I do think that The Court ought to have the benefit of it.

THE COURT: Do you think they are admissible?

Q. I think they are for the purpose --

THE COURT: Under what rule?

Q. Under compilation of and summaries of a large mass of cases and documents, and Mr. Bergstrom is here to assert that everything therein is true and correct.

THE COURT: Before you can use the summary rule, you have got to have made all of the documents available to counsel for the other side, and you haven't done that.

I think -- well let's see if they object.

Do you object?

MR. BROWN: Your Honor, for these exhibits 3 through, I think it is 148, as far as the Trust is concerned, we would stipulate that if called upon to testify today Mr. Bergstrom would say what is in these affidavits, which is not exactly saying the affidavits are admissible, but we would acknowledge that if he were to go through these one by one, this is what he would say.

Q. We will accept that stipulation.

THE COURT: All right.

I don't think they are admissible. But what we can use them for is, if you just tell me it is so, if it is so, as a proffer of what the people would say if they were here.

Q. Well, this is Mr. Bergstrom's affidavit with respect to each of those cases, Your Honor.

THE COURT: Well, you mean what -- well, he in effect is saying this is what they would say if they were here.

A. That's correct.

Q. This is based on his analysis of their individual case?

THE COURT: I will use them as a proffer for that.

Q. Yes.

THE COURT: Okay.

Q. And it is exhibits 3 through hundred, what, 48?

MR. BROWN: Yes.

Q. 3 through 148, for the record.

A. Except I think there is 147. That was withdrawn, I think.

Q. Okay. Through?

A. Hold on a second.
Number 91 was withdrawn.

Q. Okay. 3 through 148, with the exclusion of 91, Your Honor.

I ask you this. Did you assist or prepare individually each one of those affidavits?

A. Yes, sir.

Q. Did you read each one over?

A. Yes, sir.

Q. Are each one of those affidavits true and correct to the best of your knowledge?

A. Yes, sir.

Q. Are they based upon first-hand knowledge and examination of the files and your knowledge over the files?

A. Based on my first-hand knowledge and examination of my own Dalkon Shield files, yes.

THE COURT: As you know, Judge Shelley has taken senior status now. Hopefully it will rain, and this will be great for a rainy day. He won't be able to play golf, and he will pass it on to me for whatever it is worth. You don't think I am going to read all of this.

Q. I don't know. We are we are doing the best we can.

THE COURT: I want to be at truthful as I can. I am not going to read it all. But Judge Shelley has got to do something on a rainy day.

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTION OF THE UNITED STATES

Article III, Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between citizens of different States,--between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Fifth Article of Amendment:

> No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE, TITLE 11

CHAPTER 1--General Provisions

Section 101. Definitions.

In this title--

(10)(A) "creditor" means -- entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.

(13) "debtor" means person or municipality concerning which a case under this title has been commenced.

(54) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.

Section 105. Power of Court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Section 301. Voluntary cases.

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

Section 1101. Definitions for this chapter.

(2) "substantial consummation" means--

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

Section 1141. Effect of confirmation.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

Section 1142. Implementation of plan.

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor

and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

UNITED STATES CODE, TITLE 28

PART I--Organization of Courts

Chapter 6--Bankruptcy Judges

Section 157. Procedures.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

PART IV--Jurisdiction and Venue

Chapter 85--District Courts; Jurisdiction

Section 1334. Bankruptcy cases and proceedings.

(a) Except as otherwise provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Supreme Court, U.S.
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No. 96-440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PAUL W. BERGSTROM, JOSEPH S. FRIEDBERG AND GREGORY J. SEMANKO,

Petitioners,

v.

THE DALKON SHIELD CLAIMANTS TRUST,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction to disallow unreasonable attorney's fees on funds distributed from the Dalkon Shield Claimants Trust?

2. Whether the limitation of fees to ten percent of a pro rata distribution of excess funds, requiring no effort by plaintiffs' counsel, exceeded the sound discretion of the district court?

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners are three of the 29 lawyers who appealed a district court order limiting attorney's fees from certain funds distributed by the Dalkon Shield Claimants Trust. These 29 lawyers had already received more than $90 million in fees from funds paid out by the Trust to resolve the claims of their clients. (Pet. App. 8a.) When it became clear that the Trust

would have money left over after resolving all claims, the Trust scheduled a pro rata distribution of excess funds to previously successful claimants. This additional payment would be made automatically, with no additional effort required of the claimants or of their lawyers. Accordingly, the district court limited attorney's fees to ten percent of the pro rata distribution.

Even with this limitation, the 29 lawyers who appealed below collected an additional $20 million in fees. (Pet. App. 9a.) Petitioners claim that this limitation should be set aside so that these 29 lawyers can collect instead an additional $66 million in fees for no additional work. The Fourth Circuit termed this claim a "wonderful example[] of chutzpah" (Pet. App. 31a) and suggested that the Trust should have cross-appealed the ten percent limitation of fees on the ground that it was unreasonably high. (Pet. App. 32a.) A brief review of this complicated litigation reveals the wisdom of the decision below.

A. Background.

This dispute is part of the A.H. Robins Co. bankruptcy case. The district court, sitting in bankruptcy, formulated a Reorganization Plan to process and pay hundreds of thousands of claims of injury from use of the Dalkon Shield. The Plan included an innovative Claims Resolution Facility (CRF), designed to provide "fair and equitable compensation ... to persons injured by the Dalkon Shield" by means of "an efficient economical mechanism for liquidating claims which favors settlement over arbitration and litigation, thereby reducing transaction costs ... ." (Pet. App. 1g.)

To that end, the CRF gave claimants three options. Most claimants chose Option 1, which encouraged quick settlement of trivial or frivolous claims by paying $725 on very minimal proof of Dalkon Shield use and injury. Option 2 was designed

for the relatively small number of claimants who had good proof of Dalkon Shield use and injury but whose medical records also revealed likely alternative causes for those injuries. Option 3 was designed for serious and provable claims. Under Option 3, a claimant submitted a claim form and her medical records and received an offer of compensation consistent with the historical settlement value of Dalkon Shield claims prior to the Robins bankruptcy. Claimants dissatisfied with those offers could proceed to alternative dispute resolution, arbitration, or litigation.

Option 3 proved enormously successful. Offers averaged 15 percent more than pre-bankruptcy settlements for comparable claims, and over 84 percent of the offers were accepted. Many other claims were resolved by alternative dispute resolution, a simplified procedure in which the Trust was not represented by lawyers. As a result, the huge majority of Dalkon Shield claims were resolved efficiently, economically, and with low transaction costs.

To an extent that could not have been foreseen at the outset, the claims resolution process minimized the role of lawyers. The claim forms were designed and tested to be readily comprehensible to all claimants, whether or not represented by counsel. The Trust issued newsletters and instructions and helped claimants complete forms and obtain medical records. Claims were evaluated under a highly structured, rule-based system, and the presence or absence of an attorney played absolutely no role in the valuation of claims. Most important, Option 3 settlement offers were non-negotiable. As the offers were "best and final" offers, not "low-ball" opening bids, counteroffers were neither entertained nor accepted. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 Fordham L. Rev. 617, 642-43 (1992).

These procedures dramatically reduced the role of lawyers. As they did not have to perform the full range of services that lawyers usually perform, recovery of standard contingency fees was unusually generous. As the district court found, "[t]hese lawyers, in general, have been paid handsomely considering the low risk levels involved in the generally routine and mechanical representation of Dalkon Shield Claimants." (Pet. App. 23c.)

Not only was the representation of Dalkon Shield claimants "generally routine and mechanical": it was also of doubtful benefit to the claimants. One would expect that claimants with more serious injuries (and hence the prospect of larger recoveries) would be more likely to be represented by counsel than claimants with less serious injuries. That may account for the fact that Option 3 settlements for represented claimants averaged $39,047, as compared to $33,150 for unrepresented claimants. With a one-third contingency fee, the average represented claimant retained only $26,031, significantly less than her unrepresented counterpart. On that comparison, Option 3 claimants received and kept an average of 27 percent more if they were not represented by counsel.

Whether represented or not, claimants who accepted offers signed releases acknowledging their settlements as full payment of all claims. Claimants who proceeded to alternative dispute resolution, arbitration, or litigation also received full compensation for all proven injuries. Petitioners' share of these recoveries has not been restricted. They received whatever contingency fees their clients agreed to pay, even though they functioned in a legal environment specifically designed to reduce the need for lawyers and even though the evidence suggests that they did not benefit their clients. They have indeed been "handsomely paid."

B. The Pro Rata Distribution.

The CRF provides that any excess money remaining after all claims have been resolved shall be distributed pro rata to all successful claimants who recovered more than de minimis amounts. Though no excess was expected in 1989, when the Trust was funded, by 1995 it had become clear that a substantial pro rata distribution would be made. The excess resulted from $800 million of investment income earned over the life of the Trust and from the Trust's spectacular success at controlling administrative costs, which were $200 million less than original forecasts. (Pet. App. 8c.) In 1995 the Trust therefore resolved to distribute to all claimants (except those who recovered only the $725 available under Option 1) payments equivalent to at least 75 percent of their awards. These pro rata payments would be made automatically, with no additional effort required of the claimants or their lawyers.

Having learned of these matters through routine reports on Trust operations, the district court issued an order announcing its intention to limit attorney's fees to 10 percent of the pro rata distribution and inviting any dissatisfied counsel to file motions for reinstatement. A copy of this "show cause" order was mailed directly to 10,894 lawyers listed on the Trust's records as representing Dalkon Shield claimants. The 29 lawyers who were parties below moved to vacate the disallowance of fees and appealed the denial of that motion to the Fourth Circuit, which affirmed. Three of that number now petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Even a cursory review of the history of this small aspect of the A.H. Robins bankruptcy reveals that it is no ordinary case. On the contrary, it has been, in almost every respect, extra-ordinary. In the words of the Fourth Circuit:

> This has been one of the most complex bankruptcy proceedings ever to come before a federal court and involves several hundred thousand claims from all over the world. The district judge and the bankruptcy judge have been sitting together in all matters arising under the Plan and the Trust and have been very diligent in their overall supervision of this case. They have expended great time and effort in trying to see that all valid claims are promptly paid. They have urged the attorneys into new areas and procedures in an effort to achieve the best results for those injured by the product. This has required the judges to be constantly aware of how successful the CRF has been in settling claims, how much money has been spent, how many claims remain, how the settlement options were working, whether the funds were going to be sufficient, what type of proof was being required to support the claims and thereby what type and degree of legal services were required of claimants' attorneys. Quarterly reports informed the court of the millions of dollars in fees being collected by attorneys without the risk usually accompanying products liability litigation. (Pet. App. 28a.)

Thanks largely to the diligence and oversight of the district court, the vast bulk of funds distributed in the Robins bankruptcy actually reached the injured claimants; they were not consumed by lawyers or by the expenses of administration. The good work of the district court and the court of appeals in achieving this remarkable result are certainly deserving of respect.

Petitioners' objections to the decision below entirely lack substance. First, petitioners claim that the district court lacked jurisdiction under 28 U.S.C. § 1334(b) to disallow unreasonable fees. The opinion below is persuasive to the contrary. The

A.H. Robins bankruptcy is the constitutional case or controversy. Under 28 U.S.C. § 1334(b) subject matter jurisdiction extends to "all civil proceedings ... arising in or related to" the bankruptcy case. According to the legislative history, "anything that occurs within a case is a proceeding"; the term is used "in its broadest sense." H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977). As the court below correctly held, the district court's order limiting fees is a proceeding both "arising in" and "related to" the Robins bankruptcy. (Pet. App. 18a-23a.)

Petitioners' assertion to the contrary misconceives the nature of the Robins bankruptcy. They claim that their collection of unreasonable fees would have no "effect on the estate being administered in bankruptcy" (Pet. 15), because the debtor no longer exists. Robins' assets were sold and the proceeds used to fund the Dalkon Shield Claimants Trust. Petitioners seem to believe that the sale of Robins' assets and transfer of their proceeds to the Trust ended bankruptcy jurisdiction, since nothing thereafter could affect the debtor. That is absurd. The Dalkon Shield Claimants Trust was created and now exists for one purpose only—to discharge the obligations of the debtor in bankruptcy. The bankruptcy case remains open until those obligations are fulfilled and the Trust is dissolved. Any proceeding that could affect the operation of the Trust is therefore "related to" the bankruptcy case under § 1334(b).*

The jurisdiction "question" therefore reduces to this: Is the disallowance of attorney's fees "related to" the administration of the Trust? The answer is, "of course." In the words of the

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* The Fourth Circuit has repeatedly so held in upholding the district court's supervision of the Trust. See, e.g., *In re A.H. Robins Co.*, 42 F.3d 870 (4th Cir. 1990); *In re A.H. Robins Co.*, 880 F.2d 769 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *In re A.H. Robins Co.*, 880 F.2d 779 (4th Cir. 1989).

court of appeals, "[t]he disallowance of excessive attorneys' fees to be collected from the unexpectedly large pro rata distribution is a matter related to the administration of the Trust because it affects the amount that each claimant will receive." (Pet. App. 21a.) The crucial fact is that the Trust does not exist to protect its own interests. Ultimately, it will keep nothing. The Trust exists only to protect the claimants, and its mission is to serve them. Any proceeding that may have an effect on the Trust's ability to vindicate the interests of the claimants and to reduce the transactions costs borne by them is "related to" the Robins bankruptcy case within the meaning of § 1334(b).

Petitioners also seem to think that the district court's power to disallow excessive attorney's fees exists only if each and every Dalkon Shield claimant initiates an attack on her lawyer's fees. (Pet. 17-21.) This argument ignores the role of the Trust in protecting the claimants' interests and the responsibility of the district court in supervising Trust operations. The crucial and obvious fact, as petitioners well know, is that *only* the Trust and the district court can protect Dalkon Shield claimants from overreaching by their lawyers. That they have done so is to be applauded, not condemned. As the Fourth Circuit noted, federal district courts have inherent power to disallow unreasonable attorney's fees. (Pet. App. 22a.)* Indeed, the Fourth

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* See *Allen v. United States*, 606 F.2d 432, 435 (4th Cir. 1979) ("the district courts' supervisory jurisdiction over contingent fee contracts for services rendered in cases before them is well-established"); accord, *Jackson v. United States*, 881 F.2d 707, 710 (9th Cir. 1989); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1114 (7th Cir. 1982); *Krause v. Rhodes*, 640 F.2d 214, 218-20 (6th Cir.), *cert. denied*, 454 U.S. 836 (1981); *Hoffert v. General Motors Corp.*, 656 F.2d 161, 164-65 (5th Cir. 1981), *cert. denied*, 456 U.S. 961 (1982); *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1109 (3d Cir. 1979).

Circuit thought this authority "so clear" that it was "not necessary discuss the additional sources of such authority such as the federal court's power to enforce state law standards of ethical conduct and a federal district court's inherent power to regulate the conduct of the court's officers, including attorneys." (Pet. App. 23a.) Given the undoubted factual basis for limiting attorney's fees in the pro rata distribution, the district court's action was, as the Fourth Circuit found, plainly within its sound discretion.

Petitioners other arguments are similarly without merit.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. RESPONDENT'S BRIEF IN OPPOSITION CONTAINS MISSTATEMENTS OF FACT

The respondent makes several factual misstatements which provides the Court with an inaccurate understanding of the facts giving rise to the proceedings below. First, respondent alleges that when Robins' Plan of Reorganization was consummated on December 15, 1989, "no excess [Trust funds] was expected" to exist after all Dalkon Shield claimants had been paid. As a result, the respondent

suggests, no future pro rata distribution of the trust residue was anticipated at Plan consummation. (Oppo. Brief. 7). This allegation is nonsense.

On the consummation date, the Claimants Trust was funded with approximately ***$2,335 billion*** and with the express expectation that additional "***hundreds of millions***" would accrue over time in the form of investment income. (Pet. App. 1f). Because this substantial sum far exceeded what four of the five parties to the bankruptcy estimated as necessary to satisfy all Dalkon Shield claims,[1] the Petitioners, their clients and a majority of others, reasonably *expected* that there would be excess funds remaining for a future pro rata distribution following the settlement and release of their claims.

Second, the respondent represents that the excess trust funds now available for pro rata distribution to claimants "resulted from $800 million of investment income . . . and from the Trust's spectacular success at controlling administrative costs . . .." (Oppo. Brief 5). While Petitioners do not dispute the trustees' frugal administration of the Claimants Trust, or that investment of the trust corpus generated substantial investment income[2], only $1.3 billion of the Claimants Trust's original $2.335 billion funding

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[1]The district court's 1987 estimation hearings produced the following estimates of the aggregate value of Dalkon Shield-related claims: *Robins* -- .8 to 1.3 billion; *Equity Security Holders* – 1.03 billion; *Unsecured Creditors* – 1.54 billion; *Aetna* – 2.2 to 2.5 billion; and *Claimants Committee* – 4.2 to 7 billion. *In re A.H. Robins Co., Inc.*, 880 F.2d 694, 699 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

[2] The Claimants Trust Agreement *required* the trustees to invest the trust corpus but restricted their investment choices to conservative programs. (Pet. App. 5e-7e). Thus, the amount of investment income generated over time is largely a product of a healthy U.S. economy and not the result of the trustees' creative investment strategies.

payment had actually been used to satisfy Dalkon Shield claims as of the March 1, 1995 Disallowance Order. (Pet. App. 14a). Therefore, the bulk of the excess funds now available for pro rata distribution to claimants, approximately $1.0 billion's worth, represents a very large un-used portion of the *original* trust funding payment and not administrative savings and investment income as the respondent would have this Court believe.

Finally, the respondent falsely identifies the "district court, sitting in bankruptcy" as the entity which "formulated" Robins' Plan of Reorganization (Oppo. Brief 2) -- as if that fact alone provides the district court with an equitable license to redistribute the contract rights of Petitioners and their clients. Actually, the district court specifically rejected the notion that it served as the Plan's author during oral argument on the joint Motion to Vacate the Disallowance Order:

> It wasn't my [P]lan, that is for sure. I only participated in one aspect . . . one of the lawyers wanted to be indemnified . . .. I said you can forget the [P]lan. Don't call me again, because I would never approve. That was my only contribution . . ..

(Tr. at 516-17).

II. RESPONDENT'S BRIEF IN OPPOSITION CONTAINS MISSTATEMENTS OF LAW

The respondent provides this Court with citations to three opinions in which, it claims, the lower court "repeatedly" held that "[a]ny proceeding that would affect the operation of the Trust is . . . 'related to' the bankruptcy case under § 1334(b)." (Oppo. Brief 7). Contrary to respondent's

representations, however, the lower court never addressed the nature of "related to" proceedings under § 1334(b) in those cases. In fact, *In re A.H. Robins Co., Inc.*, 880 F.2d 779 (4th Cir. 1989) and *In re A.H. Robins Co., Inc.*, 42 F.3d 870 (4th Cir. 1990) do not even *mention* § 1334, much less equate proceedings affecting Trust operations as proceedings "related to" the bankruptcy case within the meaning of that statute.

Respondent's citation to *In re A.H. Robins Co., Inc. (Official Dalkon Shield Claimants' Committee v. Mabey)*, 880 F.2d 769 (4th Cir. 1989)[3] is equally off-point. In *Mabey*, the court below held that certain pre-consummation orders entered by the district court were valid exercises of its power of "continuing supervision" – a power which the district court's Confirmation Order specifically preserved as a condition of confirmation in order to assure Plan feasibility as required under the Bankruptcy Code. *Id.* at 776. Although the respondent suggests otherwise, the question of whether a proceeding affecting Trust operations constitutes a "related to" proceeding under § 1334(b) was simply not at issue. Indeed, the opinion does not even contain the phrase "related to", and its fleeting citation to § 1334(b) is merely interjected as one of eight statutory sources to further support the district court's *power* of continuing supervision over the Trust for purposes of Plan feasibility. *Id.*

In short, neither the Fourth Circuit nor any other circuit court of appeals has ever held that a proceeding affecting the post-confirmation/consummation operations of a distribution trust constitutes a proceeding "related to" the

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[3]Respondent also represents that this Court denied a petition for certiorari in *Mabey* at 493 U.S. 959. (Oppo. Brief 7 (footnote)). The respondent is wrong. According to *Shepard's United States Citations*, this Court *never* reviewed the Fourth Circuit's decision in *Mabey* on petition for certiorari.

chapter 11 case for purposes of establishing jurisdiction in a federal court under § 1334. Respondent's representations to the contrary are false.

III. RESPONDENT NEITHER ADDRESSES, NOR ATTEMPTS TO RESOLVE, CONFLICTS BETWEEN THE LOWER COURT'S DECISION AND DECISIONS OF OTHER COURTS OF APPEALS

As illustrated in the Petition, the lower court's holding with regard to the type of proceedings which "arise in" a case under Title 11 within the meaning of § 1334(b) is squarely at odds with the holdings of the Fifth and Ninth Circuits. (Pet. 10-14). Yet, the respondent does not confront or attempt to resolve this conflict in its brief.

Moreover, the Fourth Circuit's conclusion that a proceeding can be "related to" a case under Title 11 within the meaning of § 1334(b), following Plan confirmation and without any possible effect on the discharged debtor, is a holding which this Court knows to be in direct conflict with every other circuit court of appeals. (Pet. 14-17). The court below has effectively rejected the Third Circuit's decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984) as "too restrictive" for its purposes (Pet. App. 20a) and adopted a jurisdictional approach which expands the subject matter jurisdiction of the federal courts far beyond the limitations imposed by Congress and demanded by Article III of the United States Constitution. (Pet. App. 1i).

Rather than attempt to resolve this conflict, the respondent skirts the issue entirely by declaring an impact or

effect on the *debtor* to be an "absurd" suggestion[4]. (Resp. at 7). If requiring a proceeding to impact the debtor in some conceivable manner is truly an absurd proposition as respondent suggests, then this Court should intervene, if for no other reason, to definitively over-rule *Pacor* and establish a more suitable approach to determining federal subject matter jurisdiction over "related to" proceedings under § 1334(b).

The respondent also ignores the conflicting positions in the circuit courts on the issue of whether a federal district court can enter an order modifying a contingent fee agreement in the absence of a case or controversy between the attorney and client. The conflict between the Fifth and Fourth Circuits on this constitutional issue is absolute. (Pet. 18-19). If the Fifth Circuit is correct, then the Fourth Circuit's decision in the case below is necessarily wrong. There is no middle-ground in matters of jurisdiction.

The reason for the respondent's consistent ostrich-like response to the fundamental conflicts of law identified in the Petition is clear. The respondent, like the Petitioners, is incapable of resolving such divergent opinions because they are irreconcilable. Only this Court can resolve these conflicts by determining which circuit court's understanding of "arising in" and "related to" proceedings is most harmonious with the intent of Congress and the Framers of

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[4]Respondent also identifies two "crucial facts" which it apparently believes to impart subject matter jurisdiction in the district court under § 1334(b) for purposes of disallowing Petitioners' attorneys fees. (Oppo. Brief 8). These facts, which concern the Trust's self-imposed mission to protect claimants from attorney over-reaching in fee matters, were certainly not "crucial" to Congress when it drafted § 1334 nor where these facts "crucial" to the Framers when they drafted the Constitution. Such facts are crucial, if at all, only to the *Trust* in fulfilling its role as a fiduciary under Virginia law.

our Constitution.

CONCLUSION

For the reasons stated, and those set-forth in their Petition, Petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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